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JURIDICAL REVIEW

THE CONSTITUTION AND PROOF OF VOLUNTARY OBLIGATIONS

PART I

IS THERE A SYNTHESIS?

A MODERN statement of the law is that "in the absence of any writing the ordinary rule is that verbal agreement is sufficient to bind the parties, and this may be proved by parole evidence," [1] the only exception being where writ is required *in modum probationis* or the agreement belongs to the group known as *obligationes literis*. Lying behind this is the alleged fundamental principle that an actionable obligation may arise from mere consent provided the promisor should intend to bind himself and express that intention in clear words.[2] The purpose of this article is to demonstrate that there may be no such fundamental principle and that the mere existence of interdependent verbal promises does not necessarily make a contract. On the contrary it seeks to show that Scots law has never had a unitary theory of obligation, that instead it has a system of categories: so that, save to the extent verbal consent is *per se* effective as in the consensual contracts, a promise which does not satisfy the requirements of its category is not an actionable obligation.

The major premise of the modern view is that the necessity for writ in the constitution, extinction and consequent proof of an obligation is not a requirement of the general law, save where the parties stipulate for writing, or the exceptions already mentioned apply. Gloag accepted that premise and wrote his treatise on the principles of contract in the spirit of it. On page 1 of his work [3] he explains that although the term " law of contract " was not sufficiently comprehensive for his purpose, he preferred it to the awkward and unfamiliar " voluntary obligations," because " obligations in which more than one party is concerned form the main part of the subject, obligations by one party only being relatively unimportant." His belief, which has had considerable influence this past half century, was that interdependent promises make a contract. This is not surprising. A product of the very end of the nineteenth century, like most of his contemporaries he was strongly under the influence of the more powerful legal system of that era, the English common law.[4] Of that law the fairly accurate generalisation can be made that every simple contract is and must be a bargain. Gloag generalised of Scots law that every lawful bargain is a contract. He had much reason for so thinking.

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[1] McNeill & Lillie, *The Mercantile Law of Scotland* (5th ed.) at p. 5; Gloag & Henderson, *Introduction to the Law of Scotland* (6th ed.) at p. 61.

[2] *Cf.* Lord Kinnear in *Morton's Trs.* v. *Aged Christian Friend Society* (1899) 2 F. 82 at p. 85; Gloag & Henderson at p. 39.

When Stair propounded his euphonic " every paction produceth action " [5] he planted in the interstices of the law the seed of the idea that a promise is actionable from the mere consent to undertake the obligation therein contained. Prior to the Law of Evidence Amendment Act, 1853, the seed could not easily germinate for neither party could give evidence on his own behalf. The only way in which the one could obtain the deposition of the other on the facts of the case was by reference to that other's oath. Proof *scripto vel juramento* was a commonplace. Once this restriction was gone, particularly as affecting the consensual contracts which form the vast bulk of mutual bargains, it was easy to assume, as Gloag and many others did, that Stair's proposition enshrined the fundamental principle of which, with the exception of *obligationes literis*, the only limitation is "in its practical effects, by the rule that a gratuitous obligation cannot be proved except by the writ or oath of the promisor."[6] Thence it is scarcely a step to conclude that "as a general rule the law of Scotland does not insist on any particular form for the constitution of a contractual obligation. It has nothing analogous to the *stipulatio* of the civil law. A contract may be entered into orally, or in writing, or may be inferred from the conduct of the parties. And the fact that an obligation has been undertaken may, in general, be proved *prout de jure* by any competent evidence."[7] This sounds eminently sensible, but is it the law of Scotland?

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[3] Which on the title-page is headed " The Law of Contract—A Treatise on the Principles of Contract in the Law of Scotland ": references are to the second edition.

[4] A glance through Green's *Encyclopaedia of the Law of Scotland* published in 1899 shows how strong the influence of English law was on the contributors, of whom Gloag was one of the foremost; nor should it be forgotten that the fashion, still current, of many Scots lawyers taking a first degree in the law schools of Oxford and Cambridge has had an explosive effect on Scots law.

[5] I.10.7: or as one recent writer has put it: " By 1663 it had become a commonplace that a promise to pay was actionable; the only question for debate was the method of proof," *Introduction to Scottish Legal History* (Stair Society) at p. 252; but this " only question " may be a very big question indeed as many a litigant has known to his cost. Adjective law may be a very harsh master of the substantive.

What has been overlooked is that Stair so qualified his "every paction produceth action" that even *ex facie* of his writing it is doubtful whether it meant very much. It is true that he repudiated the Roman *stipulatio*, but *unico flatu* he conceded (as he had to concede, despite his fervour for the moral law) that "in most matters of importance, obligations with us are ineffectual, unless proven by oath of party, or by writ."[8] Instead of the remedy of stipulation Scots law had, according to Stair, two remedies: "*First*, If the matter be of great moment, or which requires to its perfection, solemnity in writ, all such agreements, premises and pactions are accounted imperfect, and not obligatory, until writ be subscribed. . . . The other remedy . . . is that by a statute of Parliament, 1579, c. 80, all writs of great importance are to be subscribed by the party or by two notaries, before four witnesses, wherein custom hath interpreted matters of importance to be that which exceeds an hundred pounds Scots; and it is so far extended, that, in matters where writ may, and uses to be, adhibited, probation is not admitted by witnesses, but only by oath of party or writ."[9] The defender in *Hope Bros.* v. *Morrison*[10] may be excused if after his experience of the law of Scotland in action he dismissed Stair's claim as pretentious gallimaufry.

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[6] Gloag at p. 50.

[7] Gloag & Henderson at p. 61.

[8] I.3.5.

In that case the pursuer verbally agreed to execute, as he did, plasterwork for the defender at the price of £344 1s. 7d. for which he sued. The defender averred that he had made to the pursuer five separate progress payments totalling £237 10s. 0d., and admitted liability for the balance. The pursuer denied the payments and took the plea that proof of payment had to be *scripto vel juramento*. Lord Sorn sustained this plea and, although he was disposed to prefer the evidence of the defender given in proof before answer, granted decree to the pursuer in the sum sued for. Here was a bargain of a kind made and performed every day. In English law it would have been a simple verbal contract of which performance on one side by payment is provable parole. Even in Scots law it seems to have been a consensual contract of location, nevertheless, although what the defender alleged he had done was done in performance of his part of the bargain; as there was not (and could not have been) a ready money transaction and as each payment exceeded £8 6s. 8d. the relevant rule restricted proof to the writ or oath of his creditor. All will agree with Lord Sorn's comment "that the question of discarding it (*s.c.* the rule) from our law is a question which is due—or perhaps overdue—for examination," but the reason for the rule is almost as startling as the rule itself. Unless the payment is one side of a single and simultaneous transaction it becomes payment of a book debt. If the debt exceeds £8 6s. 8d. payment of it, albeit in performance of an antecedent obligation itself provable parole as in the case of a credit sale, must be established by writ.[11]

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[9] I.10.9.

[10] 1960 S.C. 1; 1960 S.L.T. 80.

[11] Hume's Lectures III at p. 20.

It is true that in *Hope Bros.* it was a question of performance and not of the constitution of an obligation, but Scots law is so imbued with a jealousy of and aversion from parole evidence [12] that the distinction merely emphasises how much it is a system dominated by form. Erskine in his *Principles* gives a good picture of the rigidity of the system. Speaking of probation, he asserts that although Scots law has not gone so far as French law in requiring that " all contracts for sums exceeding 100 livres must be reduced into writing," [13] it rejects the testimony of witnesses (1) in all payments of any sum above £100 Scots; (2) in all gratuitous promises; (3) in all contracts where writing is essential to their constitution or where it is usually adhibited; it admits the testimony of witnesses where the value involved does not exceed £100 Scots in the case of payments, nuncupative legacies, and verbal agreements containing mutual obligations, but not otherwise; only in the case of the well-known consensual contracts is parole evidence fully admissible.[14]

To a lawyer there may be under some circumstances a comprehensible distinction between an obligation which as it may be constituted verbally is said to be actionable but in effect is worthless because it is not contained in a writ so that its legal existence cannot be proved, and a verbal obligation which is not actionable and is worthless because it is not constituted by a writ and, therefore, has no legal existence. To the layman the whole is a legal chimera. If he reads at night he will find consolation in the diatribes of Jeremy Bentham. But both—for it cannot be assumed that the former is altogether devoid of common sense—may well doubt the title of the claim that Scots law infers an obligation from mere consent and that as a general rule no particular form is required, especially when the exceptions appear considerably more numerous than the contents of the rule.

Even the distinction just mentioned is incongruous. It has been said that the doctrine of personal bar is " parcel of the law of evidence," which "operates by conclusively intercepting or shutting out all contrary pleas and proof." [15] So if there has been part performance of an agreement the party allowing the part performance is *rei interventu* barred from taking the plea otherwise available to him that his obligation cannot be enforced against him. Where writ is required only *in modum probationis* (as it is often put) it would seem that if there has been part performance the circumstances are apt to eke out the lack of writing by proof of the *rei interventus*. According to some authorities this is not so, and the doctrine of personal bar,[16] which is apparently evidentiary in nature, only applies where writing is required not by way of evidence but in constitution. If the man on the Corstorphine trolleybus has read thus far he would be inclined to agree that there is a prima facie case for examining the state of Scots law in the matter of voluntary obligations. As good an approach as any to this examination is to consider how a statutory enactment such as section 2 of the Hire Purchase and Small Debt (Scotland) Act, 1932, fits in, if at all, with the modern doctrine. That doctrine, in its entirety, maintains that voluntary obligations fall into three classes:

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[12] Hume *op. cit.* at p. 19.

[13] (7th ed.) at p. 458: an assertion which, in the light of the restrictions imposed by Scots law, seems singularly devoid of substance.

[14] *Ibid.*

(1) *Obligationes literis* which require to be constituted in writing probative of the parties:

(2) Obligations which may be constituted verbally but require to be proved by the writ or oath of the grantor:

(3) Obligations which may be constituted verbally and proved *prout de jure*.[17]

Adherents to this doctrine maintain that, whereas the doctrine of personal bar is relevant to class (1), it is irrelevant to class (2).[18] Gloag considers that class (1) offers no relaxation to a writ *in re mercatoria*,[19] which Gloag and

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[15] Rankine, *Personal Bar*, at p. 1.

[16] Gloag at pp. 161 and 191.

[17] Gloag *ibid.*; Gloag & Henderson at pp. 39, 61 and 109.

[18] Gloag *ibid.*

[19] *Op. cit.* at p. 186.

Henderson describe as "certain writs used in ordinary business."[20] Either ancillary to or perhaps completely independent of this trinity are: (a) obligations which otherwise belong to class (3) (or possibly even to class (2)) which the parties have agreed to reduce to writing[21]; (b) writs *in re mercatoria*[22]; (c) gratuitous obligations[23]; (d) cautionary obligations under the Mercantile Law Amendment Act, 1856; (e) hire-purchase agreements affected by the Act of 1932; (f) obligations affected by the prescriptive statutes.[24]

Section 2 of the Hire Purchase and Small Debt (Scotland) Act, 1932, which provides that "no contract to which this Act applies . . . shall be binding on any person as hirer . . . unless (1) the contract is signed by such person," came up for construction in *United Dominions Trust* (*Commercial*) *Ltd.* v. *Lindsay*.[25] The pursuers, as owners of a motor-vehicle let on hire purchase to the defender, sought to repossess it. The defender relying on the section averred that what he had signed was a printed form, which, at the time of signing, did not contain particulars of the agreement he had made with the pursuers, and that it was not, therefore, "the contract" as required by the Act. He further averred that the two witnesses whose signatures appeared *ex facie* of the document founded on by the pursuers had not seen him sign, nor had he acknowledged his signature to them. The pursuers pleaded that these averments were irrelevant because (a) in the absence of fraud (and none was averred) the defender was bound by whatever particulars[26] they had inserted and (b) the defender was barred *rei interventu* because he had paid the deposit and thereafter two instalments of the contractual price.[27] The sheriff-substitute repelled these pleas, holding that the Act requires " the contract "—that is, the terms agreed upon by the parties—to be signed by the hirer, not merely a piece of paper which subsequently would contain these terms.[28] On appeal the sheriff adhered.

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[20] *Op. cit.* at p. 107.

[21] Gloag & Henderson at p. 113.

[22] Gloag at p. 185.

[23] Which Gloag & Henderson (at p. 109) treat as a species of class (2); but see Gloag at p. 50.

[24] *Dickson on Evidence*, ss. 412 et seq.

[25] 1959 S.L.T. (Sh.Ct.) 58.

[26] In fact the pursuers had correctly filled up the printed form.

[27] He had also taken possession of the vehicle, a fact which the sheriff-substitute seems to have ignored: it seems that the correct plea should have been that the defender had homologated his promise.

Neither judge gave much consideration to the defender's plea that the document signed by him had not been properly witnessed. The sheriff-substitute said: " The Act does not require the hirer's signature to be witnessed, and so these two signatures are surplusage." [29] The sheriff said: " The witnesses, of course, were not necessary in a transaction of this kind." [30] The sheriff did not refer to the pursuer's plea of *rei interventus*, but of it the sheriff-substitute said: " Nor do I think that the circumstances here are such as to admit of the doctrine of *rei interventus* if the doctrine can be prayed in aid at all to cure the very considerable defect alleged in this case. The defender's actings were not ' unequivocally referable to the agreement.' They could well have followed on a sale by instalments—one of £60 and two of £7 15s. 10d. each, or indeed to any number of instalments." [31]

The matter of the correct interpretation of " unequivocally referable " is not germane to the main purpose of this article, but perhaps it is permissible to ask whether this almost chauvinistic adherence to the strict letter of " unequivocally referable " is indeed the law? Suppose there had been a sale by instalments, properly proved parole by the pursuers and supported by the taking possession of the car by the defender, and his payments of three instalments, would it be reasonable to say that there is no *rei interventus* because the acts relied on might conceivably relate to a hire-purchase agreement? Anything is susceptible of two or more explanations. It is possible that the defender stole the car and paid the money from the dictates of conscience. The law of *rei interventus* has never been that the conduct relied on must point to one, and one only, possible explanation. If that were so the doctrine would be a dead letter. " Unequivocally " does not mean " necessarily " in the absolute without regard to the attendant circumstances. It does mean that the conduct relied upon must clearly refer to the agreement proved *habili modo* according to normal probabilities. For the purpose of testing the strength of the reference the agreement must be ignored, but not the conduct averred in the context of the attendant circumstances.[32]

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[28] This approach should be compared with that of Devlin J. to section 40 (1) of the English Law of Property Act, 1925, in *Parker* v. *Clark* [1960] 1 All E.R. 93 at pp. 102–103.

[29] At p. 59; but he did not exclude these averments from probation because they formed " part of the general picture."

[30] *Loc. cit.* Whether for the same reason as the sheriff-substitute, which is probable, or because he considered the document a writ *in re mercatoria* is not clear.

[31] *Loc. cit.*

What is much more important, however, is that in relation to the modern doctrine the case makes strange reading. That doctrine, it will be recalled, divides all obligations into three classes: (1) where writ is required in constitution; (2) where writ is required only as evidence; and (3) where no writ is required.

Leaving aside the vexed question of the scope of the exception of writs *in re mercatoria*, section 2 can be construed as creating another *obligatio literarum* falling within class (1). So construed, the sheriffs were wrong in holding that the defender's signature did not require authentication, but standing his admission on record of the fact of the agreement (which there was) the agreement was good if *rei interventus* were relevantly averred and competently proved. On the other hand if the sheriffs were right in holding that no witnesses were required and the section is construed as requiring writing by way of evidence, then the agreement fell into class (2) with the consequence that it was good when made verbally and properly proved (assuming the writing to be defective) by the defender's admission on record.[33] If the doctrine does not apply then section 2 has created a new category of obligation even more stringent in effect than any *obligatio literarum* for it is unleavened by the exception of proof by defective writ or oath or admission on record where there is homologation or *rei interventus*. Whether those responsible for section 2 knew what they were about is a question permissible to ask but fruitless to attempt to answer. Probably the truth is that the whole law in the matter of the constitution and proof of voluntary obligations is so shot through with absurdities that legislation finds its way on to the Statute Book in a form which it should never have assumed, and its construction consistently with the development of the common law is an esoteric parlour game of the blind leading the blind. To fit the various pieces together may be a devotional exercise to bring joy to the heart of a Jesuit, but the business man is much more likely to consider that the liturgy of the law is so remote from reality that he acts wisely if he leaves it and lawyers well alone.[34]

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[32] See Sholl J. in *Francis* v. *Francis* (1952) V.L.R. 321 at p. 322 as to the analogous, but much narrower, English doctrine of part performance.

[33] Dickson *op. cit.* s. 276.

Section 6 of the Mercantile Law Amendment Act, Scotland, 1856, is a good illustration of the same confusion. According to the preamble and the commentators [35] the Act was intended to introduce into Scots law in matters of cautionry the English law enshrined in section 4 of the Statute of Frauds of that country. In some respects that law is crystal clear. In so far as it applies to a particular type of obligation (including guarantee) it requires the agreement to be in writing, failing which the person suing on the obligation must prove the fact and the terms of the obligation by means of a written admission thereof signed by the person sued on the obligation. This is a matter of evidence and the signature need not be witnessed. The lack of writing may be got over if there has been part performance, a doctrine which bears a slight resemblance to homologation and *rei interventus* but whose application is restricted to transactions concerning an interest in

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[34] *Cf.* Gower, " Business " in *Law and Opinion in the Twentieth Century* at pp. 166–172.

[35] *Cf.* Bell's *Commentaries* (7th ed.), Vol. I at p. 402, note 8.

" land," [36] provided it is a case " in which a Court of Equity would entertain a suit for specific performance " [37] which last has some resemblance to specific implement. To attempt to introduce into Scots law this no doubt highly competent yet extremely technical branch of English law, and that by a side-wind, seemed an act of faith. It was.

Even yet it is not settled whether a cautionary obligation under the Act, which requires the obligation to be in writing and subscribed by the grantor, should be in probative form or merely signed without the need for authentication. Gloag treats the question as unsettled, but goes on to say: " It is also clear that an improbative writ (provided it be signed by the obligant) is binding if advances are made on the faith of it. Such advances constitute *rei interventus* and bar any right to resile, if such right exists." [38] Now according to the modern doctrine [39] *rei interventus* can apply only to class (1) obligations, therefore, on this reasoning the obligation requires to be probative as an *obligatio literarum.* Much the same statement appears in Gloag and Henderson under the chapter headed " Cautionary Obligations," [40] although in the same work cautionary obligations are included as amongst " the most important contracts which are classed as *obligationes literis.*" [41] On the other hand Gloag states: " It is decided that a probative writing is not necessary in guarantees *in re mercatoria.*" [42] If his proposition on the very next page be true, that the exception of *in re mercatoria* " does not apply to documents recording a contract which, by a positive rule of law, must be constituted in writing," [43] it follows according to the doctrine that cautionary obligations fall into class (2).

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[36] At least according to Cheshire and Fifoot, *Law of Contract* (5th ed.) at p. 167: of course recent statutory reform has all but abolished the statute.

[37] *Cf.* Kay J. in *McManus* v. *Cooke* (1887) 35 Ch.D. 681 at 697; for a learned discussion of what all this means (if it can mean anything to a Scots lawyer) see *J. C. Williamson, Ltd.* v. *Lukey* (1931) 45 C.L.R. 282 (High Court of Australia).

[38] *Op. cit.* at 184.

[39] *Supra.*

[40] At p. 206.

[41] At p. 61.

[42] At p. 184.

[43] At p. 185.

The confusion becomes more evident if the question is asked—is there any need for a class of writs *in re mercatoria*? Manifestly not all cautionary obligations are *in re mercatoria*. If cautionary obligations which are not *in re mercatoria* fall into class (2)—that is, where writing is only required *in modum probationis*—and such a class, according to Gloag and Henderson, as a general rule does not require to be in probative form,[44] there is no need to distinguish between cautionary obligations which are and which are not *in re mercatoria*. It follows that any obligation which falls into class (2) does not require the aid of the exception *in re mercatoria*. If the exception does not, as Gloag maintains, apply to class (1) then to what class, if any, does it apply? It is not enough to say with Gloag and Henderson: " Certain writs used in ordinary business, *in re mercatoria*, are sufficiently authenticated by the signature of the grantor. These are known as privileged writings. In this class are included bills, promissory notes and cheques, receipts and mandates or orders used in the ordinary course of businesss."[45]

The question is—what are they privileged from? It has never been suggested that the examples given by Gloag and Henderson were ever *obligationes literis*, and so they cannot be privileged from class (1). If they belong to class (2) they do not need to be privileged, if such class does not require authentication. If they belong to class (3) they are not privileged but handicapped.[46] The answer, of course, is clear, that they are privileged from the authenticating statutes; but this answer does not explain why they do not fit into any of the classes as laid down by the modern doctrine.

Perhaps, then, the modern doctrine is erroneous, at least in some respects. For example, if it be true as a general hypothetical proposition that whenever in Scots law for whatever reason a contractual obligation requires to be embodied in writing signed by one or more of the parties the authenticating statutes apply, at once it may be perceived that here is a key which immediately unlocks one or two doors. It makes sense of the exception of writs *in re mercatoria*.[47] It enables a consistent and coherent construction to be placed on such innovating statutes as the Mercantile Law Amendment Act, Scotland, 1856, and the Hire Purchase and Small Debt (Scotland) Act, 1932. If true, it means that Lord McLaren had no need to beat his breast at the thought of a cautionary obligation becoming an *obligatio literarum* ; it also means that there was no need whatever, at least in the sense of its preamble, for the Mercantile Law Amendment Act, Scotland, 1856, or at any rate section 6 thereof.[48]

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[44] At p. 109.

[45] At p. 107.

[46] It is true that this seems to ignore the fact that they are privileged from formal authenticity where the parties to a class (3) obligation constitute the obligation in writing with intention to make it a class (1) obligation, but this only underscores the question asked.

One difficulty the hypothesis does not explain, namely, why homologation and *rei interventus* do not apply to obligations of class (2). According to the modern doctrine the reason is clear enough. Class (1) obligations require a probative writing both in constitution and as proof.[49] The absence of writing means that there is no executory agreement enforceable by one party against the other. The agreement, whether verbal or in improbative writ or partly one and partly the other, is incomplete. Until completed by constitution in a probative writing either party may resile from the bargain which he has made.[50] The effect of homologation or *rei interventus* is (subject to admission on oath or on the closed record) to complete the bargain and destroy the liberty to resile.[51] Class (2) obligations are otherwise. If and when verbally made the executory agreement is complete ; although it cannot be directly enforced it cannot theoretically be resiled from.[52] The function of homologation or *rei interventus* is to complete an inchoate bargain; they cannot complete an already perfect obligation.

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[47] Even if that is not conceded, Gloag's restriction applies *supra*

[48] Even if the writer's hypothesis be wrong it cannot be affirmed with confidence that the draftsmen of either the Act of 1856 or the Act of 1932 knew more than anyone else of the law they sought to change or even of the law they sought to make.

[49] Stair II.3.11 and 13.

[50] Erskine III.2.3 and 4. *Goldston* v. *Young* (1868) 7 M. 188.

[51] Erskine III.3.49, Bell's *Commentaries* I 346.

As an exercise in logic this reasoning is flawless; as a justification of a rule of a legal system which purports to serve the interests of the community and to aspire to justice, it is deplorable. Unless there is some other good and sufficient reason (and there seems to be none) why class (1) obligations, presumably the more important, should be favoured by the court in the exercise of its equitable jurisdiction, and such favour be withheld from class (2) obligations, the rule should be changed forthwith. Perhaps, however, there is no such rule, and the exceptions of homologation and *rei interventus* do apply to class (2) obligations. The immediate objection to this suggestion is—how does it solve the problem that the function of these exceptions is to complete an incomplete agreement? The answer is that there is no problem because class (2) obligations are not complete until writing intervenes: *in modum probationis* does not mean what the modern doctrine assumes it to mean.

The next objection is that so to hold is to undermine the assumed fundamental principle of the law of obligations, namely, that provided the promisor should intend to bind himself by an enforceable obligation, and should express that intention in clear words, his promise is binding upon him even if there be no valuable consideration for the promise.[53] As Gloag has put it: " This general rule is laid down by all the institutional writers, and is referred to in many cases as undisputed law." [54]

This is a formidable objection. Nevertheless, for reasons already given, it may be worth while to reject it meantime and attempt an examination of the authorities on the basis of a wholly different working hypothesis. Stair wrote: " The Romans, that they might have clear proof of pactions and agreements, would second none with their civil authority but such as had a solemnity of words by way of stipulation, whereby the one party going before, by an interrogation, the other party closed by an answer conform, which was clear both to the parties and witnesses; or otherwise unless there was the intervention of some deed or thing beside the consent, or that it were a contract allowed by the law, or such other paction as is specially confirmed, without all which it was called *nudum pactum, inefficax ad agendum.* We shall not insist on these, because the common custom of nations has resiled therefrom, following rather the canon law, by which every paction produceth action *et omni verbum de ore fideli cadit in debitum.*"[55] Why Stair should have gone to the trouble in this passage, and in others, in setting out the civil law in detail only to conclude that it was not the law of Scotland provokes the inquiry whether, after all, his conclusion was so certainly the law as he would have it. The use of the word "resile" is significant. Bearing in mind that he wrote in the age of Grotius, it is not unreasonable to suppose that he was attempting to refashion the law according to the formula, which had proved so successful politically, that a promise being binding on the conscience was also binding in law. A good working hypothesis is, therefore, that Scots law at the time of Stair was much nearer the spirit and practice of the civil law than he allowed, and that by his formula "every paction produceth action" he dismissed far too easily the existing law. New law must take account of existing technical rules, otherwise the system is distorted, and the rules which may have been efficient before the change become an obstacle and anachronistic. There is sufficient evidence to justify the belief that this has been the fate of Scots law.

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[52] This must greatly comfort the aggrieved party.

[53] *Cf.* Lord Kinnear in *Morton's Trs.* v. *Aged Christian Friend Society* (1899) 2 F. at p. 85.

[54] At p. 48.

If then we are to look at Scots law through Romanist spectacles, it is needful to have a little understanding of the lenses. The first step is to have an understanding of the phrase *nudum pactum.* English lawyers have used the phrase as meaning a promise unsupported by consideration moving from the promisee, hence a gratuitous promise is a *nudum pactum*. Because Scots law has never had the English doctrine of consideration it has been supposed that it has never had the concept of *nudum pactum* on the assumption that in Scots law a gratuitous obligation is in principle actionable. This was Gloag's belief,[56] which it is submitted, as will be shown later, is probably incorrect. The Roman concept of *nudum pactum* was different. To the civil law the distinction between a gratuitous obligation and an onerous obligation was irrelevant when the question was whether the promise bound the promisor.[57] In the civil law every actionable obligation arising *ex consensu* was a contract but not every consensual declaration was actionable. " A contract in the Roman sense is not any declaration of *consensus* that is intended to create an obligation, but only a declaration of *consensus* that results in an obligation actionable by the civil law." [58] A promise, to be actionable, had to satisfy the requirements of one or other of the categories recognised by the civil law: otherwise it was not a contractual obligation but *nudum pactum*. If the word " contract " has any meaning in Scots law this is its meaning. All actionable promises are contracts whether unilateral declarations or part of a mutual agreement. This is both wider and narrower than the " contract " of English law: wider, in the sense that consideration as understood by that law is irrelevant, narrower in the sense that an English court might find consideration where a Scottish court would find none; that is, " gratuitous " has a much wider denotation in Scots law than in English law.[59]

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[55] I.10.7.

There is no doubt that the phrase *nudum pactum* was well known in the Parliament House. It is unlikely that it was used in the English sense, but rather, in view of the origins of Scots law, in the Roman sense as meaning that the formalities of the law had not been complied with. In recent years much has been heard of the claim that Scots law is a civilian system.[60] It would be surprising if the insistence of the civil law on the " form " of a contractual obligation had in no way influenced Scots law. As has been seen, Stair though he rejected the *stipulatio* conceded that Scots law had substituted another remedy, the remedy of writing.[61] The suggestion is then that to a Scots lawyer of Stair's time, and before and after, a *nudum pactum* meant a promise which did not comply with the form of writ.[62] Of course this suggestion leaves unexplained the distinction between writ required in constitution and writ required *in modum probationis*. Whether this distinction ever had much substance, and, if a distinction at all, whether it was not an historical accident, are questions to be canvassed later: meantime and *ex hypothesi* the distinction, if any, is ignored.[63]

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[56] At p. 49: and see Bell's *Principles*, ss. 64 and 218.

[57] Of course the difference might well be material in considering the standard of care as, for example, between a lender in *commodatum* and the borrower.

[58] Sohm's *Institutes* (3rd ed.) at p. 371.

[59] *Cf.* " Consideration in the Law of Scotland " by Lord Normand: 55 L.Q.R. 358 at p. 365.

Further support for the proposition that Scots law has always regarded writ as having the status of " form " is derived from the degree of veneration attached to writ by the law of evidence. As already noticed, Hume in his lectures spoke of the jealousy of and aversion from parole evidence which is or was such a signal feature of the law.[64] " Parole " is commonly construed as " verbal " or " oral "[65]: but " verbal," as has been pointed out, in Scots phraseology covers both oral negotiations and informal writings.[66] " Writ " as distinct from " parole " means a writing which proves itself, which is probative either in accordance with the authenticating statutes or because it is deemed to be so as with a writ *in re mercatoria*.[67] According to Lord Curriehill, in respect of the high evidentiary value which it accords a probative writing, our law in 1863 differed from that of most European countries.[68] Such a writing proves itself; its challenger must establish the negative, whereas the converse and normal rule[69] applies when the genuineness of an informal writing is attacked.[70] It is all very well to say as a matter of armchair speculation that the mere declaration of consensus ought to bind the promisor, but this has not been the practice of the law. Bell noticed this. "In most courts of jurisprudence, with a view to the sure establishing of that consent which is of the essence of all contracts and obligations, there have been appointed certain requisites and solemnities as at once evincing the deliberate act of consent and the authenticity of the contract. . . . It has appeared fit that some contracts, called Consensual, may be proved by witnesses swearing to the words that were used, and are to be held as perfect from the moment that these words are deliberately used to bind the parties. In others, called Real contracts, there is required to their completion some overt act, without which the contract is not held to be concluded; but the agreement and the real act which perfects the contract may be proved by witnesses. In others, again, more exposed to misapprehension, as being of no recognised character, or having no defined object and intent, it is held that without some special ceremony, calling on the witnesses for particular attention, and clearly expressing the agreement, or without writing delivered to testify both the facts and the words, the contract or obligation is not binding"; and so, after a reference to the use of the *stipulatio* in the civil law, he continues, "with us, writing delivered is requisite for matters so elusory. So a promise to pay money, or a cautionary obligation must be established by written evidence, and accompanied by delivery of the document." [71]

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[60] See *e.g.*, " Strange Gods " by T. B. Smith: 1959 J.R. 119.

[61] I.3.5 and I.10.9.

[62] *Cf.* Stair I.10.4: *Hamilton* v. *Richard* (1698) Mor. 12412.

[63] Even Stair ignores the distinction, I.10.9.

[64] *Supra.*

[65] *Cf.* McNeill & Lillie *op. cit.* at p. 5.

[66] By Lord Mackay in *Korner* v. *Shennan*, 1950 S.C. 285 at p. 300; 1950 S.L.T. 215.

[67] This clearly appears from Stair I.10.9; his " two " remedies are in effect one, namely a probative writing in all matters of great importance: see I.3.5. where he speaks only in terms of one remedy.

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[68] *Ferrie* v. *Ferrie's Trs.* (1863) 1 M. 291 at p. 298.

[69] *Eiqui affirmat non negat incumbit probatio.*

[70] *McIntyre* v. *National Bank of Scotland*, 1910 S.C. 150, *per* Lord Kinnear at p. 152; 1910 S.L.T. 163.

[71] *Commentaries* (7th ed.) Vol. I at pp. 335 and 336.

The hypothesis, therefore, on which the examination will proceed of the authorities referred to in subsequent parts of this article, may be stated thus:

(1) Save in the matter of the consensual contracts of sale, hire, partnership and mandate, Scots law in the realm of contractual obligations has been traditionally a " formal " system requiring something more than a normal declaration of consensus.

(2) Until that " something more " is done an oral declaration is imperfect, a *nudum pactum*, leaving the promisor free to repudiate his promise.

(3) But a *nudum pactum* can become an actionable obligation if the promisor by reason of homologation or *rei interventus* is barred *personali exceptione* from pleading the imperfection.

(4) With the exception of the real contracts, the " something more " required is a writing probative of the grantor delivered to the grantee.

(5) In principle no vital distinction exists between obligations requiring writ in constitution and those requiring writ *in modum probationis*.

It is submitted that many of the older decisions can only be understood in terms of this hypothesis, which in turn must be seen against certain rules of evidence and procedure. The first of these is the oath of reference which, prior to the Law of Evidence Amendment Act, 1853, played a most important role. " It stands alongside of the party's writ as the only admissible proof on many matters; on others, it is received as well as writ and parole evidence, and in general, it is competent to an unsuccessful litigant as an appeal from the courts of law to the *forum conscientiae* in his adversary's bosom." [72] It is conclusive of the matter referred because the reference is " a quasi-contract by which the parties are supposed to stake the result on oath." [73]

The second is the effect of an admission on the closed record. " The admission by a party on record in a civil cause is almost always both competent and conclusive proof of any fact in issue. It is conclusive even upon facts which are proveable only by party's writ or oath." [74]

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[72] Dickson *op. cit.* s. 1414.

[73] *Ibid.* s. 1495.

Furthermore, in reading the older cases and texts it is necessary to think oneself into the atmosphere of the Parliament House as it was before the age of procedural reform commenced in 1808.[75] Today the tendency is whenever possible to allow a proof of the general evidence as to the facts; so much so that many modern pleadings instead of focusing the issues tend to be studies of the obscure. Relevancy is still a monarch, but has ceased to be absolute and become constitutional. A great deal more attention is paid to the weight and credibility of the evidence. The pages of Morison tell a different story. Then the exception was a sword not a shield; the advocate a dialectician.

Even so it cannot be gainsaid that the hypothesis here formulated is in the teeth of much that was said (though not necessarily decided) by a majority of the Second Division in *Bryan* v. *Butters*,[76] and by a majority of the whole court in *Paterson* v. *Paterson*,[77] but like Homer even judges have been known to nod.

J. J. Gow.

(*To be continued*)

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[74] Dickson *op.cit.* s. 276.
[75] *Introduction to Scottish Legal History* (Stair Society) at p. 421.
[76] (1892) 19 R. 490.
[77] (1897) 25 R. 144.

COHABITATION WITH HABIT AND REPUTE

It would I think be true to say that Parliament, in enacting the Marriage (Scotland) Act, 1939, intended as regards irregular marriages—

(i) to abolish the constitution of marriage by declaration *de praesenti* (the interchange of express consent to immediate marriage);

(ii) to abolish the constitution of marriage by promise *subsequente copula*; and

(iii) to retain cohabitation with habit and repute[1] as a method of constituting marriage.[2]

Parliament achieved the first two purposes by providing in the Act that no irregular marriage by those methods should be valid after the commencement of the Act. Nothing was said in the Act about (iii), and the purpose of this article is to discuss the present position.

Parliament did not realise that cohabitation with habit and repute was never a form of constituting[2] marriage. It merely proved a previous tacit or inferred consent, which consent constituted the marriage. The then Secretary of State was misled as to the law, presumably by the wording of the Report of the Departmental Committee. He in turn misled Parliament.

The Committee had recommended[3] that "marriage in Scotland shall not be validly constituted[2] . . . in accordance with the existing doctrines of Scottish law known as marriage . . . (iii) by habit and repute." This statement that marriage could be so constituted was contrary to authority—it is quite clear that it could not, as will be shown later. Even the Committee seems to have had some doubts, for at an earlier stage of its report[4] it refers to marriage proved in this way; but it did not disregard it as being outwith the terms of reference—which were, of course, to enquire into the constitution of marriage.

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[1] Termed "marriage by habit and repute" at p. 12 of the Report dated December 15, 1936, of the Departmental Committee appointed to enquire into and report upon the law of Scotland relating to the constitution of marriage and to recommend what changes, if any, are desirable.

[2] My underlining.

[3] p. 16.

It was certainly regarded as a mode of constitution by the Secretary of State when the Bill following on the Report came up for discussion in Parliament.[5] He then said[6]: "The remaining form of marriage is by cohabitation or habit and repute. This, also, the committee propose should be abolished. Here . . . we depart from the views of the committee . . . and we have come to the conclusion that this form of marriage may serve a useful purpose and that on balance it would be better not to do away with it. . . . There would be risk of hardship if we abolished this form of marriage. . . . I am recommending that it should be retained while the other two types of irregular marriage should be abolished."[7]

In the event the Act,[8] as has been mentioned, enacted simply that "No irregular marriage by declaration *de presenti* or by promise *subsequente copula* contracted after the commencement of this Act shall be valid." "Habit and repute" was simply not mentioned. It was not specifically abolished (though Professor A. E. Anton has said that the Act abolished irregular marriages),[9] nor was it declared to be a mode of marriage. There has been some suggestion that it could have been abolished by inference from the abolishing of marriage by consent *de praesenti.*[10] I agree with Professor Smith's conclusion that it could not have been inferentially abolished. The cases to which he refers have since been fortified by *A B* v. *C D.*[11]

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[4] p. 12 of the Report.

[5] *Hansard*, Vol. 345 (1938–39 Session) 2246 *et seq.*

[6] *Hansard*, 2249

[7] My underlinings.

[8] Marriage (Scotland) Act, 1939, s. 5.

[9] "Modern Scots 'Runaway Marriages,'" 1958 *Juridical Review* 253 at 255.

[10] Smith, *The British Commonwealth, The Development of its Laws and Constitutions*, Vol. I, p. 791.

[11] 1957 S.C. 415; 1958 S.L.T. 213, *post.*

If, then, " habit and repute " was before the Act a mode of marriage, it still is; if it was not, it still is not. The authority to the effect that it was never a mode seems to me overwhelming. First, let us look at some authors:

(a) Stair.[12] " By our custom, cohabitation, and being commonly repute man and wife, validate the marriage." " Marriage is proved by cohabitation." " Cohabitation, and behaving as man and wife for a considerable time, presumeth marriage."

(b) Erskine.[13] " . . . Marriage may also be entered into where the consent is not express but is discovered *rebus ipsis et factis.* In this way it [consent] is presumed."

(c) Bell,[14] after writing of habit and repute as making a marriage, adds " or more accurately, the two circumstances [cohabitation and habit and repute] combined always afford strong evidence of marriage and in Scotland, where marriage may be effected by *de praesenti* consent without proof of the precise time and place when such consent was interchanged, evidence which must be generally conclusive."

(d) Walton.[15] " Prior to 1940 irregular marriages might be constituted in three ways . . . (iii) by the interchange of consent to be inferred from proof of cohabitation and habit and repute. This method raises a presumption of law that the necessary consent has been exchanged."

(e) Gloag and Henderson.[16] " This . . . is the only form of irregular marriage now recognised by the law. The consent by which the marriage is constituted may be proved. . . ."

Professor T. B. Smith[17] is, apparently, less certain and he comes down on both sides of the fence. First he says—

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[12] *Institutions*, I.4.6: III.3.42: IV.45.10.
[13] *An Institute of the Law of Scotland*, I.6.6.
[14] *Principles of the Law of Scotland*, 10th ed., 1516.
[15] On *Husband and Wife*, 3rd ed., p. 24.
[16] 6th ed., p. 605.
[17] *The British Commonwealth*, pp. 790–791.

> " Marriage [by habit and repute] may also be entered into when the consent is not expressed. . . . [It] arises from matrimonial consent inferred."

A little later, however, he remarks that in his view—

> " the doctrine of ' habit and repute ' . . . is not limited to the aspect of presumption of evidence that a man and woman who have cohabited must at some time have been married. . . . In Scotland cohabitation with habit and repute may actually result in marriage and the court may pronounce a decree of declaration of marriage, though it cannot single out with certainty any particular date on which mutual consent to marriage was approved." [18]

He goes on to say, apparently with approval, that in *Campbell* v. *Campbell* [19]—

> " It seems to have been clearly the view of the Scottish judges . . . that proof of cohabitation with habit and repute establishes marriage by tacit consent of the parties."

Elsewhere [20] Smith has more recently stated that marriage by habit and repute remains valid.

I find it difficult to reconcile these remarks. Smith perhaps envisages two forms of habit and repute: (i) where there is implied consent of the parties, when the marriage will date from that consent; and (ii) without any consent, when the marriage will date from the conclusion of the habit and repute. In other words, in (i) the marriage will be constituted by consent, date from the first cohabitation, and be proved by that cohabitation with habit and repute; whereas in (ii) the marriage will be constituted by cohabitation with habit and repute, and date only from the acquiring of repute.

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[18] But in *Campbell* v. *Campbell* (*post*) Lord Westbury says the same, that the inference of consent must be of consent at some particular period, and goes on to regard the first moment when the parties were free to marry as sufficiently certain. The same view prevailed in *De Thoren* v. *Wall and A B* v. *C D* (*post*).

[19] (1866) 4 M. 867.

[20] (1953) 69 *Law Quarterly Review* 30 at 31; 1960 *South African Law Journal* at p. 63.

Of course, if cohabitation with habit and repute is required as a form or formality of the marriage—if the marriage is made by

> "Living a good while together and getting a married repute"

then such marriage must date from the acquisition of the habit and repute: but it does not, as the cases will show.

To take first the main cases on the point of whether cohabitation with habit and repute makes a marriage, or merely proves an earlier consent which consent made the marriage, though that contracted marriage could not be proved for a period:

(a) Campbell *v.* Campbell[21] referred to *ante*. The House of Lords, affirming the Court of Session, held that marriage of the parties had been established by the proof of cohabitation and repute. Lord Westbury said[22]—

> "It is not pretended by any of the learned judges [of the Court of Session] that marriage is constituted by cohabitation with habit and repute but they, one and all, I think treat the evidence upon that subject as evidence to prove that which alone constitutes marriage, namely, the consent of the parties[23] . . . that inference of consent, when drawn, must be of consent at some particular period . . . you must infer the consent to have been given at the first moment when you find the parties able to enter into the contract . . . the marriage, therefore, in theory of law, took place at the time when [the parties] became competent to enter into the contract."

(b) Sassen *v.* Campbell.[24] ". . . It would be more proper to say that cohabitation with habit and repute is a mode of proving the fact of marriage rather than a mode of contracting marriage."

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[21] (1866) 4 M. 867 and (1867) 5 M.(H.L.) 115.

[22] p. 140.

[23] My underlining.

[24] (1867) 5 M.(H.L.) at 140; (1867) L.R. 1 Sc.App. at 211.

(c) De Thoren *v.* Wall.[25] An English case sent for opinion of the Court of Session. Held that the presumption of marriage arising from habit and repute was not rebutted by proof that there had been an invalid marriage *in facie ecclesiae.* Lord Chelmsford[26]: "A marriage is established by habit and repute on the ground that the cohabitation as husband and wife is proof that the parties have consented to contract the relation." Lord Westbury's view of moment of consent was approved.

(d) Wallace *v.* Fife Coal Co.[27] Lord Ardwall approved a dictum of Lord Moncreiff in *Lapsley* v. *Grierson*[28]: "Marriage is not constituted by the mere fact of cohabitation with the assumption of the characters of husband and wife, and repute to that effect. The proper doctrine is that the consent by which marriage is constituted by the law of Scotland may be proved by such habit and repute." The court found that the facts stated did not warrant a finding of marriage.

(e) Nicol *v.* Bell.[29] Lord Justice-Clerk Thomson observed: "There is no particular difficulty about the law. . . . 'Marriage is presumed or inferred from cohabitation.' " It is not clear whether what was meant was marriage or consent to marriage, but the Inner House went on to approve an Outer House interlocutor to the effect that the parties were lawfully married "by cohabitation from 1930 until 1950 and the habit and repute arising therefrom." If the inference was of consent, the wording of the interlocutor is unfortunate.

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[25] (1876) 3 R.(H.L.) 28.

[26] At p. 33.

[27] 1909 S.C. 682 at 685; 1909 1 S.L.T. 509 at 511.

[28] (1845) 8 D. 34 at 61.

[29] 1954 S.L.T. 314 at 319.

Then there are cases covering the fundamental point of the moment at which a habit and repute marriage is concluded. We shall find that the rule is that the matrimonial consent (which makes the marriage) is to be inferred (from cohabitation with habit and repute) to have been given at the first moment when the parties became able to marry: and that it is immaterial that the parties did not at that moment of inferred consent know that they were not married, or that they did not intend to marry.

The main cases on this point are—

(a) Campbell *v.* Campbell.[30]

(b) De Thoren *v.* Wall.[30]

(c) A B *v.* C D.[31] A girl under sixteen, and therefore barred from marriage by the Age of Marriage Act, 1929, went through a ceremony of marriage on July 27, 1942, with an Englishman who was then a member of the forces stationed in Scotland. Thereafter the parties resided together partly in Scotland and partly in Manchester, at the homes of their parents. The purported marriage was, of course, void. She became sixteen on August 12, 1942. The parties, both unaware that their " marriage " was a nullity, lived together and had five children, the last of whom was born on January 13, 1949. After his demobilisation in 1945 the husband and wife resided in Scotland until July 1948 when the husband went to Manchester. He thereafter returned to Scotland for only one night, but she visited him twice in Manchester, the last time in February 1951.

In 1951 the wife, wanting to terminate the marriage, took advice, and in the event brought an action of nullity. The husband brought a cross-action of declarator of marriage on the ground that they had cohabited with habit and repute from her

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[30] *Ante.*

[31] 1957 S.C. 415; 1958 S.L.T. 213.

> sixteenth birthday (August 1942) until 1948. In answer she pleaded that she did not then (1942) know that the marriage ceremony was void, and that she gave no consent to marriage after she came of age. She was given her decree of declarator of nullity of the original marriage. But decree was also granted in terms of the conclusion of the summons in the husband's action "that they were lawfully married to one another by habit and repute."[32]
>
> A statement of Lord Chelmsford in *De Thoren* v. *Wall*[33] was approved[34]: "The Court of Session is of opinion that, assuming the ignorance of the parties of the invalidity of the ceremony of marriage during the whole period of their cohabitation, yet, after the removal of the impediment to their marriage and before the birth of their eldest son, they became married persons. I agree entirely with this opinion. A marriage is established by habit and repute on the ground that the cohabitation as husband and wife is proof that the parties have consented to contract the relation."

The Courts and the Faculty of Advocates are both partly to blame for the confusion of thought which has arisen as to the nature and constitution of a habit and repute marriage. We are told that the appropriate form of conclusion is[35]: "For declarator that A B and C D were lawfully married to one another by cohabitation in . . . from . . . until . . . and the habit and repute arising therefrom." I do not see how this can mean anything other than that such a marriage is constituted by the cohabitation with habit and repute and, with respect, this is nonsense.

It will be noted that in the following cases (among those previously cited) the findings or decrees correctly express the effect of cohabitation with habit and repute—

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[32] p. 416.

[33] (1876) 3 R.(H.L.) 28 at 33.

[34] By Lord Guthrie at p. 426 of *A B* v. *C D*, he there saying that the ratio of the decision in that case applied in terms to the facts of *A B* v. *C D*.

[35] Smith, *op. cit.*, p. 791, is my authority.

(i) Campbell *v.* Campbell [36] where the House of Lords affirming the Court of Session, held that marriage of the parties had been established by the proof of cohabitation and repute, it having been previously made clear that consent of the parties alone constituted the marriage.

(ii) De Thoren *v.* Wall [36] where the House of Lords found that the presumption of marriage arising from habit and repute was not rebutted.

(iii) Hendry *v.* Lord Advocate.[37] The pursuer, it seems, asked for declarator that she and her deceased " husband " had been married persons. According to the S.L.T. report the court granted decree of declarator in those terms.

Findings open to criticism in that they at least suggest that the cohabitation with habit and repute makes the marriage, include, taking the latest cases—

(i) Nicol *v.* Bell.[38] The report is not clear but seemingly the Inner House approved an Outer House interlocutor to the effect that the parties were lawfully married " by cohabitation from 1930 to 1950 and the habit and repute arising therefrom."

(ii) A B *v.* C D.[39] Declarator was granted in terms of the conclusion of the summons, *i.e.*, that the parties were lawfully married to one another by cohabitation with habit and repute [40]—obviously an error of wording in view of the reference to and approval of Lord Chelmsford's statement in *De Thoren* v. *Wall* to the effect that the moment of consent is the moment when the parties were first free to marry.[41]

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[36] *Ante.*

[37] 1930 S.C. 1027; 1930 S.L.T. 793.

[38] 1954 S.L.T. 314.

[39] 1957 S.C. 415.

[40] p. 416.

[41] (1876) 3 R.(H.L.) at p. 33.

The suggestion is thrown out that the appropriate form of conclusion might better run—" For declarator that A B and C D were lawfully married by consent on [date when they were first free to marry] which consent is established by cohabitation, etc."

Conclusions

1. Parliament intended to abolish all marriage by consent, but to retain, so as to avoid " risk of hardship," cohabitation with habit and repute, which it wrongly believed to be a method of constituting marriage.

2. Parliament failed in the attempt. What the Act has done is to abolish marriage by express consent to immediate marriage, but it has not abolished marriage by consent inferred from cohabitation with habit and repute.

3. That failure was due to a misunderstanding of the juridical nature of the habit and repute marriage, which misunderstanding must be attributed to the careless use of such words as " marriage by habit and repute," or ill-advised references to habit and repute as a form of marriage.

4. Because of the rule that those who are under no impediment to marry and who cohabit for a sufficient time to establish habit and repute are held in law to have been married by consent from the inception of their cohabitation, it follows that those who do expressly or otherwise consent to marry are in fact and in law married by such consent.

5. This may be comforting for young lovers from furth of Scotland or otherwise. For their marriage they need nothing more than residential qualification and consent—no banns, no ceremony. Nor need they necessarily reside in Scotland after their marriage by consent followed by cohabitation.[42] But they may not be able to prove the consent, *e.g.*, if they part after a short cohabitation; or if the marriage is terminated by death before " habit and repute " operates; or if the consent is disputed.

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[42] For a discussion of the law on this point see *Walton*, p. 334.

6. On the other hand although truly married according to the law of Scotland, they can in practice change their minds and treat themselves as single. They can (say) dispense with divorce as a preliminary to a second marriage, since none can prove the first.

7. All this is very confusing and demoralising. Parliament should put matters right by abolishing all irregular marriages in Scotland, however constituted.

D. I. C. Ashton-Cross.

SCOTS LAW AND ROMAN-DUTCH LAW *

A Shared Tradition

"WE import our lawyers from Holland," Butler observed to Saddletree in *The Heart of Midlothian.* Walter Scott had written this novel round actual events which took place in Scotland in 1736, and at that time the statement put in Butler's mouth was no exaggeration—except that " Holland " was a misnomer for " The Netherlands." By 1818, when the book was first published, the Law Schools of the Netherlands had ceased to be the Mecca of the aspirant to practise in the Scottish courts. This tradition did not survive the Napoleonic Wars. As a result of the same European upheaval, the Netherlands came under the Napoleonic Codes; and the Dutch Colony of the Cape of Good Hope (as it became) was annexed to the British Crown. Cape Province with the other Provinces of the present Union of South Africa was thus to perpetuate and disseminate Roman-Dutch jurisprudence, which had been superseded in its country of origin—a country which had earlier contributed notably to the development of Scots law. Separated by two continents, Scots law and South African law during the nineteenth century and first half of the twentieth century were destined to work out, more or less independently, problems of remarkable similarity. Each system recognised essentially the same basic principles; the external factors also corresponded closely. I wish to say something about Scotland's debt to Roman-Dutch law in the seventeenth and eighteenth centuries, and then to consider the relationship between Scots law and South African law today.

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* Based on a lecture delivered to the Edinburgh University Law Society at the opening of the Winter Term, 1960. An address of similar content, but directed to a South African audience, was delivered at the Centenary Celebrations of the Law Faculty of Cape Town University on September 4, 1959, and appears in the record of these Celebrations—see *Acta Juridica*, 1959, 36.

If one goes back to the period before Stair the similarities of development in Scots law and Roman-Dutch law seem striking.[1] In each jurisdiction there had been in early times a substratum of customary law supplemented by what in general terms one can describe as legislation. The earliest influences of Roman and Canon law were mediated through the clergy—as judges or practitioners in the ecclesiastical courts; as notaries; or as arbiters or practitioners in lay disputes, which would not normally fall within the jurisdiction of ecclesiastical tribunals.[2] These ecclesiastical lawyers might well have been trained in Italy or France; but, in due course, rulers preferred to employ in the administration laymen rather than ecclesiastics—and these laymen were often legists, *legistae*, trained abroad in the great Schools of Civil law. Law schools [3] teaching Roman law were established to train at home those who aspired to practise law in the lower and higher courts or to serve in what today we would call the Civil Service. With the establishment of permanent centralised courts, staffed mainly by professional judges and overshadowing the local, feudal or municipal courts, the way was prepared for a fuller and more systematic reception of the Civil law. It was largely a superimposed Roman law, and yet a Roman law growing from below—when advocates trained in that discipline appeared to argue in the local courts. This learned law covered many situations not regulated by custom or statute; it inspired legislation; it rationalised customary law itself; and it provided a framework for future development. It is an academic question whether Roman law was in theory subsidiary law applicable *ipso jure* where no custom or statute was in point, or whether Roman law was the " common law "—as Stair puts it " not acknowledged as a law binding for its authority, yet being as a rule followed for its equity." In fact Roman law was invoked generally both in the Netherlands and in Scotland. Its strength lay largely in the control exercised by the University Law Schools[4] over the minds of those who were to concern themselves in the courts with law in action. (This is a thought for law teachers in both our countries today. In the Army senior officers were fond of observing " No bad troops; only bad regimental officers." Should we say with equal justice " No bad judges; only bad professors "?)

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[1] For the historical background of Roman-Dutch law, the writer has relied mainly on Wessel's *History of Roman Dutch Law*, R. W. Lee, *Introduction to Roman-Dutch Law*, 5th ed., on unpublished material of Professor Robert Feenstra of Leiden University and of Dr. W. de Vos of Cape Town. For the general historical background of Scots law (within the scope of this paper) reference may be made to D. Baird Smith in *Sources and Literature of Scots Law* (hereafter referred to as "*Sources*"); Stair Soc. 1, Chapter 14; J. Irvine Smith and G. C. H. Paton, *Introduction to Scottish Legal History*, Stair Soc. 20, Chapters 3, 4 and 5. J. Mackintosh, *Roman Law in Modern Practice*. M. G. Fisher, "Scotland and The Roman Law," Tul.L.R. 22 (1947) 13; P. Stein, *The Influence of Roman Law in Scotland*. Studia et Documenta Historiae et Juris XXIII Rome 1957; also, by the author himself, *The British Commonwealth: Development of its Laws and Constitutions* (hereafter referred to as "*Smith*"), Vol. I (Scotland), Chapter 22; "A Meditation on Scottish Universities and the Civil Law," Tul.L.R. 33 (1959) 621.

[2] Of course, *personae miserabiles* might bring themselves within the jurisdiction of the ecclesiastical courts. See H. Coing, "English Equity and the Denunciatio Evangelica," L.Q.R. 71 (1955) 223.

[3] The earlier foundations in the Netherlands were Leuven (Louvain) 1426; Leiden 1575; Groningen 1614; Utrecht 1634. In Scotland St. Andrews was founded in 1411—though Civil law was only taught for a short period in the sixteenth century. Glasgow (founded 1451) and Aberdeen (1494) taught both Civil and Canon law prior to the Reformation.

I have been speaking so far of the formative period of Scots law and Roman-Dutch law in the sense of the laws actually administered in Scotland and the various Provinces of the Netherlands.[5] In both cases, however, a great synthesising work was necessary to create a mature and integrated legal system from elements of customary law, of feudal law, of Canon law and especially of the Civil law as modified and systematised by the Commentators. Legal literature in Scotland before Stair was represented mainly either by collections of decisions such as Durie and Dirleton, or by works on procedure—from which a good deal of substantive law can be deduced—such as the *Practicks* of Balfour, Spottiswood and Hope. Similarly, in Netherlands legal literature, before Grotius, there are well-known works on procedure like the *Praxis* of Damhouder and the *Maneer van Procedeeren* of Merula, opinions of leading jurists, and collections of decisions such as that of Christinaeus. Stair's work had been preceded by Craig's *Jus Feudale*, and Grotius had indeed also forerunners actually in the field of the substantive law of the Netherlands—Gudelinus, Peckius and Zoezius among them—but (though his precursors are important), Grotius (or de Groot) is truly the Father of Roman-Dutch law as Stair is the Father of Scots law.

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[4] For Scottish law students, however, the Scottish universities failed to satisfy requirements at a quite early date. See p. 41, *infra*, and article last cited, note 1, *supra*.

[5] The writer is well aware that the law varied from Province to Province, but is compelled to generalise. " Netherlands " he also uses in a general sense, though frontiers and political control varied at different periods. A Scotsman, exposed to the irritation of hearing the U.K. described as " England," is naturally careful (*pace* the *Encyclopaedia Britannica*) not to refer to " Holland " except as one of the Provinces.

The first edition of the *Inleidinge tot de Hollandsche Rechts-Geleerdheit* of Grotius was published in 1631 (The Jurisprudence of Holland) and is admirably translated into English by the late Professor R. W. Lee. Stair's first edition, *Institutions of the Law of Scotland*, appeared fifty years later. The authors had a good deal in common. Both concerned themselves, not only with law, but also with religious controversy, politics and diplomacy. As a result Grotius suffered imprisonment and exile, and Stair only escaped imprisonment by seeking asylum in the Low Countries between 1682 and 1688. (I shall bluntly confess that I admire Stair as a lawyer but dislike his political trimming.) Each had considerable experience of law in action—Grotius as Advocaat-Fiscal of Holland; Stair as Lord President of the Court of Session. Both men were widely read and deeply learned—Grotius the greater scholar; Stair the more experienced court lawyer. The great institutional works on their countries' laws which they produced were written, not in Latin, but in the everyday language of their countrymen. These works were written as creative treatises, set out according to original schemes of arrangement, and were not overloaded with citations after the fashion of some of their contemporaries (and I might add of our contemporaries). In the Preface to his First Edition, Stair expressly revolts against the " nauseating burden of citations," and, though

Grotius may have regretted that he had few books by him when he composed the *Inleidinge* in prison—and did not originally contemplate publication—he did not (when he had opportunity) think fit to insert a mass of reference to other men's writings. Paradoxically perhaps a passage from Grotius or Stair may be strengthened by resting on *ipse dixit* rather than on a reference to authority. I have found citations in Stair which would not support the proposition for which they were adduced.[6] On the other hand, Stair's own opinion—like that of the other Scottish institutional writers—still (if Lord Normand, as I believe, is right) ranks in authority at least on the same level as the decision of a Division of the Inner House of the Court of Session.[7]

Stair and Grotius alike had digested the leading commentaries on the Civil law—also the relevant feudal and customary law enforced by the courts and perpetuated in collections of decisions or practicks. The late Lord President of the Court of Session, Lord Cooper of Culross, shortly before he died, carried out an investigation into the authorities which were being cited to Stair as a judge during the twenty years before he published his *Institutions*.[8] The largest single source was the Corpus Juris itself—almost always the Digest. Next in importance come the earlier Scottish decisions and Craig's *Jus Feudale*. Repeated reference is made to Grotius, Vinnius, Gail and Gudelinus, Schotanus, Matthaeus, Perezius and eight more writers. Occasional references are made to numerous other (about thirty-four) commentators including Peckius, Gomezius and the Voets—the tendency being, as citation from Johannes Voet before 1681 illustrates, to rely on the most modern works from the Continent and from the Netherlands in particular. Mere counting or identification of citations possibly establishes little more than that Stair had had his attention constantly drawn to the cream of the Civilian

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[6] See *Acta Juridica* (1958), 146.

[7] Lord Normand, "Scottish Judicature and Legal Procedure." Transactions of Holdsworth Club, University of Birmingham (1941) 40; *Smith* 626–627.

[8] Lord Cooper of Culross; see on this A. H. Campbell, "The Structure of Stair's Institutions," David Murray Lecture (Glasgow) 1954, 17–18.

Commentators, and had had to apply his mind to their reasoning in reaching his own decisions. Perhaps the greatest individual influence on Stair's thought was Grotius,[9] though even in Stair's treatment of obligations (where this is most apparent) he expressly disagrees with the great Hugo on such vital issues as *pollicitatio*[10]—the enforceable obligation created by mere declaration of will. Moreover, Stair's premises regarding natural law were more conservative than those of Grotius, and part at least of the ingenious and original scheme of arrangement of Stair's *Institutions* may, as Professor Campbell has suggested, be inspired by Puffendorf's *De Jure Naturae et Gentium*.[11] Stair may have studied the *Inleidinge* of Grotius, and certainly some passages in the *Institutions* indicate the probability that he had,[12] but the work of Grotius which the Scottish writer seems always to cite is *De Jure Belli ac Pacis*.

Neither Stair's *Institutions*—which was perhaps a more comprehensive and authoritative work in its field than the *Inleidinge* of Grotius—nor the *Inleidinge* itself, became known internationally as their qualities would have merited. (The great reputation of Grotius' *De Jure Belli ac Pacis*, of course, reflected authority on all his other work.) Latin was the *lingua franca* of scholars and jurists; English and Dutch were languages of restricted influence. Many of Stair's legal contemporaries in Scotland, of course, spoke and read Dutch; Stair himself probably did so too during his six years' exile in the Low Countries, where he prepared his second edition of the *Institutions*; he may indeed have had some knowledge of that language when he went over to the Hague and Breda in 1649 and 1650 to negotiate with Charles II. Whatever Stair's personal knowledge of

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[9] *Sources* 180; *Acta Juridica* (1958) 145.

[10] See *Acta Juridica* (1958) 145–146.

[11] See Campbell, *op. cit.*, note 9, *supra*.

[12] Contrast Stair 1.9.4. with *Inleidinge* 3.33.2; 3.34.2. *De Jure Belli ac Pacis* IIc. XVII, 13–14. As to the latter, see in particular R. Feenstra *Acta Juridica* 1958, 27. The *Inleidinge* was certainly among the works contained in the Advocates' Library on its foundation in 1692 and *First Catalogue*, 41. For the content of a Scottish Lawyer's Library in the seventeenth century, see Cooper (1954) 66 J.R. 1.

Dutch, and though many judges and advocates in Scotland up to the early nineteenth century understood it well, it is significant that the Roman-Dutch authorities which were referred to in Scottish practice were (so far as I can trace) almost always those who wrote in Latin. Grotius, the Voets, Noodt, Groenewegen, Vinnius and Huber were often cited (in Latin); the works of van Leeuwen and van der Linden—though in the Advocates' Library—were not much relied on by direct citation.

Stair had not himself studied in one of the great law schools of the Netherlands before being admitted to practice as an advocate,[13] but throughout the seventeenth and eighteenth centuries a surprisingly large number of Scottish law students resorted there to study under teachers of European reputation. One bright young Scottish student is given immortality through a generous word of praise by the celebrated Johannes Voet in his *Commentaries* (now conveniently translated by Mr. Justice Gane) for suggesting an ingenious reading—one of these small things which show the quality of a great scholar and a gentleman. In the great days of the Stuarts—when Marie de Guise, a dedicated exile from the French Court, held the reins of government for her radiant and ill-fated daughter, the Queen of Scots; and even in the days of the Charleses and the later Jameses—Scottish law students had frequented the French universities. When, however, French influence came to be associated with Jacobitism and with Catholicism, those prudent Scottish fathers, who were strictly Protestant and had an eye to political advancement, preferred to send their sons to the safer environment of the Netherlands. There were sound commercial and financial advantages for some. The Scottish staple port at Campvere controlled by the Lords Conservator survived until 1799.[14] Moreover, of course, the universities most frequented by Scotsmen—Leiden, Utrecht and Groningen—were universally renowned for their law teaching. Researches of the late Professor Meijers disclose [15] that between the years 1600 and 1800 some 1,600 Scottish students studied at Leiden alone—from a population that was just over 1,000,000 [16] at the beginning of the eighteenth century and just over 1,600,000 at its close.[17]

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[13] For biography, see *Sources*, pp. 63 *et seq.*

[14] J. Davidson and A. Gray, *The Scottish Staple at Veere*, *passim.*

The indirect influence of the Dutch teachers upon Scots law must have been immense. As Lord Macmillan observed in one of his judgments in the House of Lords [18]: "The law of Scotland was then still in a formative stage. . . . During the seventeenth and eighteenth centuries Scottish students of law, in the absence of opportunities of academic instruction in their own country, resorted in large numbers for their legal education to the great seminaries of civil law in Holland. . . . From their sojourn in Holland the aspirants to practice in the Parliament House brought back with them, not only the principles which they had imbibed from the masters of Roman-Dutch law, but also the treatises of which the law schools of the Dutch universities were so prolific. No Scots lawyer's library was complete in those days which did not contain the works of Grotius, Vinnius, the Voets, Heineccius and other learned Civilians." (If these works had been more closely consulted by Scottish lawyers of the nineteenth and twentieth centuries, we should have been spared the confusion of terminology which has led to the designation of an action, such as that in which Lord Macmillan gave judgment, as an *actio injurarium.* Even now, I am not without hope that some courageous and learned judge will correct this abuse.)

A word on the instruction and then on the treatises mentioned by Lord Macmillan. Those who taught the Civil law in the Netherlands commented on the adoption, modification and abrogation of Civil law rules in contemporary practice, and on many occasions the same practice had been adopted in Scotland on analogy with that of the

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[15] J. C. Gardner, *Sources*, 232–233.

[16] G. S. Pryde, *Treaty of Union 1707*, 44.

[17] H. G. Graham, *Social Life of Scotland in the Eighteenth Century*, 4th ed., 536.

[18] *Stewart* v. *L. M. S.*, 1943 S.C.(H.L.) 19 at pp. 38–39; 1944 S.L.T. 13.

Netherlands. A course on the *Jus Romanum Hodiernum* at Leiden had immediate practical relevance for a Scottish student. Moreover, Scottish students took with them abroad textbooks on their own legal system—which they could use for comparative purposes—noting the convergences and divergences of Scottish and Roman-Dutch law. Thus John Erskine of Carnock in the 1680s had his copies of Stair and Hope's *Practicks* with him as he studied abroad in the Low Countries.[19] The Scottish institutional writers were also studied by Continental scholars—if no language barrier impeded. Mackenzie's *Idea Eloquentiae Forensis* drew tributes from Johannes Voet, Ulrich Huber and other notable jurists of his day. James Boswell (Johnson's biographer) set himself to master at Utrecht so much of Erskine's *Principles* each day—and had the laudable plan of translating this work into Latin, so as to make it available to European scholars generally. But, alas, despite the encouragement of the good Professor Trotz, this was never accomplished.[20] Let the distractions of Boswell from his studies by the charms of Belle de Zuylen and other ladies be a warning to students against making too strong a mixture of love with learning. As the projected translation of Erskine was abandoned, like the treatise of his greater predecessor, Stair, Erskine's institutional works are little known outside Scotland. Paradoxically, Craig's *Jus Feudale*,[21] which stands on a much lower level of authority in Scotland, having been composed in Latin, was given a warm reception on the Continent. An edition was produced by Mencken of Leipzig, and it was the subject of lectures at Utrecht and Leiden in the 1690s.[22] I have been struck by the fact that the professors in the Dutch universities felt themselves so sufficiently at home with the Scottish system as to undertake instruction in it. Thus in 1692 Colin Mackenzie wrote from Utrecht[23] " our professour has been this two years bygone offering our countrymin for whom he pretends to have kindness, a colledge (*i.e.*, course) off Feudal law with a strict inquirie into Craig whom he says he studied upon our accounts." Six years later he wrote[24]—this time from Leiden—asking for his books of feudal law to be sent to him so that he might take a course—" for my professor is thought very good on that subject; and pretends to correct Craig, tho' he has a vast opinion of him."

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[19] *Sources*, 181.

[20] See *Boswell in Holland*, ed. F. A. Pottle 196, 239. Boswell (at p. 200) describes Trotz as "one of the ablest lawyers in Europe." A. A. Roberts, *S. A. Legal Bibliography*, notes that he taught at Utrecht from 1741–1773.

[21] Written circa 1603, pub. London and Edinburgh 1655; Leipzig 1716; trans. Lord President Clyde, 2 vols. Edinburgh-London 1934.

[22] *Sources*, 65 and notes *infra*.

Again, James Boswell, who in 1763–64 studied at Utrecht—as had his father and grandfather before him—entered in his diary[25] (he is addressing himself) " Consider: it is a plan that may be of use to you for a whole life. It is to take a *privatissimum* on the law of your country with one of the ablest lawyers in Europe, who by comparing it with the Civil and Dutch, will give you a complete knowledge of law."[26]

You may well be thinking—why did young Scotsmen not find proper teaching in their own country? The three pre-Reformation Scottish universities—all far older than Leiden, Utrecht or Groningen—had all given instruction in the law, and Aberdeen was largely founded as a law school. At Edinburgh, the post-Reformation university, a law faculty had been established at the beginning of the eighteenth century. Even so, the Scottish universities could not compete in attraction with those of the Netherlands. The story is too long, sad and humiliating to tell now. I have set it down elsewhere in a paper, published in the *Tulane Law Review*, in memory of the late Professor de Zulueta.[27] The vision of Scotland as a great provider of legal scholarship faded after the disastrous field of Flodden in 1513, and even more modest hopes were frustrated after the Reformation. The rehabilitation of legal education in Scotland has not been fully achieved even yet—though the spirit of reform and progress has been stirring vigorously for some time. Four centuries ago the Reformers proposed a four-year comprehensive and full-time course in Municipal and Roman law as a university qualification for legal practice. However, this project was abandoned quickly in the face of opposition. Advocates who considered there was " more law in Edinburgh than siller to pay for it " were not enthusiastic, and the Divines were probably influenced against the training of lawyers in the universities by the attitude of the Reformers in Geneva. Regarding a Faculty of Law they considered that " those who apply themselves in this Faculty are for the most part dissolute, being young men of quality." Even after the opposition had been overcome in the eighteenth century, no flourishing law school arose in Scotland.

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[23] Translator's Note, *op. cit.*, note 21, *supra*, p. XVII.

[24] *Ibid.* XVIII.

[25] *Op. cit.*, note 20, *supra*, at p. 200. A *privatissimum* was a private course of instruction given by the professor at home to a select pupil or pupils.

[26] By Boswell's time it had become obligatory for an Intrant to the Faculty of Advocates to be examined in Scots law, but this requirement had only been introduced in 1750. Until well into the eighteenth century admission had been after examination in Civil law *or* Scots law—the former being the more honourable method. Stair Soc., Vol. 20, 52; Hannay, *College of Justice*, 135 *et seq.*; *Smith*, 619, 685.

In the eighteenth century there were some notable teachers of Scots law in Edinburgh and Glasgow such as Erskine, Millar and Hume—but there was no succession of first class men and no Law Faculty as such of distinction. Professorial emoluments offered little attraction, except as a supplement to practice. Scottish students who could not afford to study in the Netherlands universities could obtain some of the benefits at second hand. So far as teachers of the Civil law in Edinburgh were concerned until well into the nineteenth century, as Grant has written, " They all seem to have taught diligently out of the Dutch textbooks without adding anything to the literature of the subject." [28]

Because of the opportunities for a Civilian training abroad, and because Scots law itself was then very close to the Civil law, the weakness of scholarship in the Scottish

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[27] " A Meditation on Scottish Universities and the Civil Law," Tul.L.R. 33 (1959) 621.

[28] Grant, *Story of Edinburgh University*, ii, 366. See also note 27, *supra*.

Law Faculties was not so damaging to the learned tradition in Scottish legal practice in the eighteenth century as was to be the case subsequently when English influences on Scots law had greatly increased. During the eighteenth century a recognisably distinct municipal law of Scotland had developed. Decisions of the courts—though no strict doctrine of *stare decisis* ruled—had selected or rejected particular Civilian doctrines, and had resolved conflicting views on specific points. Institutional treatises had digested and systematised the case law, and prepared the way for further development of the law by the judges—whose mental background was, of course, essentially that of Civil and feudal lawyers, even when creating new Scots law. As Scots law became more defined, the education of lawyers came to be based primarily on the municipal law of Scotland—rather than on " Civil law " or " Feudal law " in general. The students' and practitioners' task was greatly assisted by the publication of the institutional treatises of Stair (1681 and 1693), Bankton (1751–53) and Erskine's *Principles* (1754) and *Institutes* (posthumously 1773). Perhaps the Faculty of Advocates' insistence on an examination in Scots law in 1750 indicates the growing importance for student and practitioner of the distinctively Scottish system. Nevertheless the treatises and decisions on the Scots law throughout the eighteenth century are close to the Civil law, and, where Scottish authority was lacking, a cross-bearing on the Dutch Commentators was always most relevant.

In the passage I quoted from Lord Macmillan [29]—about Scottish students in the Low Countries—he commented not only on the young Scottish advocate's training, but also on the treatises he took home to use in practice. It may well be that by the time he was elevated to be a Lord of Council and Session he was citing the commentators less and less, and relying more and more on precedent (though not in the rigid English sense). At all events, however, though the authority of decisions increased in Scotland, the system of pleading by written cases—which was in general use up to 1825, and thereafter could be ordered up to 1850—gave advocates ample scope for ingenuity in using their Roman-Dutch and other Civilian treatises. Moreover, the Advocates' Library, founded in 1692 by Sir George Mackenzie, contained at its foundation over 1,500 legal works—of which the overwhelming majority were Continental treatises, mainly from Leiden. During the eighteenth century this library was stocked constantly with all the latest contributions to Civilian thought made by European scholars—including in particular those from the Netherlands.

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[29] See note 18, *supra*.

In his Report on the Civil Law Collection in the Advocates' Library, Professor Walker observed[30]: " Down to 1800 . . . the collection seems to include the principal works of all the important Civilians. Thereafter the connection with Europe, as evidenced by this collection, dries up." " The connection with Europe dries up ": it is as definite as that. The works of the leading Pandectists of the nineteenth century are sparsely represented both in the Advocates' Library and even in some Scottish universities. The influence of the great legal seminaries and authors of the Low Countries—which for generations had trained the lawyers of Scotland—was, I have said, switched off. You may wonder why. There is a short answer. The lights were going out all over Europe. In 1793 Revolutionary France had conquered Belgium, was threatening the Netherlands, had torn up the Treaty of the Scheldt. Britain and France were to be engaged in a life and death struggle for most of the next twenty-two years. During this time Scotland was cut off from her traditional cultural and trade contacts with the Continent as a whole and the Low Countries in particular; and when at long last it was possible to resume them, for a Scottish lawyer the occasion and the main attraction for legal study in the Netherlands and

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[30] " Report to the Dean of Faculty on Books in the Advocates' Library presently housed in Room ' J.' " Sept. 1932. Walker notes that relatively few purchases of Civilian treatises were made after 1780.

France had vanished. In 1809 the Napoleonic Codes had been imposed on the Netherlands: Roman-Dutch law had been superseded in its original home and the energies of scholars were diverted more and more either to interpreting the Codes or to academic investigation of what had been " pure " Roman law. Scots law remained uncodified, though the institutional treatises of the great trilogy, Stair, Erskine and Bell, could have provided a basis for codification if Scottish lawyers had pressed for it, and if *per impossibile* the British Parliament at Westminster had blessed the idea.

Scots law in the early nineteenth century was, as Lord Cooper has said,[31] a " finished philosophical system well in advance of the times " ; but, being isolated, was not immune from the dangers of parochialism, narrowness of vision ; and, being to some extent forced into contact with English law on unequal terms, was not left altogether free to develop according to established principles. Lord Cooper also considered that in the eighteenth century Scots law " came within an ace " of sinking its identity in the European school, " and only failed to do so because of the growing power of the forces introduced by the Union of 1707." " To this day," he observed, " our legal affinities are markedly closer with this school than with the Anglo-American law, though we have latterly moved—or drifted—to an intermediate position." [32] This I believe to be true, and note that Lord Cooper referred to the ultimate, but delayed, operation of latent forces. These had to await their opportunity. During the formative era of Scots law, in the seventeenth and eighteenth centuries, contact with Roman-Dutch law had been particularly close. It is significant that this contact remained fruitful for about two centuries after the Union of the Scottish and English Crowns—when James VI of Scotland assumed the Crown of England as well as that of Scotland—and it remained in full vigour for nearly a century after the fusion of Scotland

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[31] Lord Cooper of Culross, *The Scottish Legal Tradition*, 11.

[32] *Ibid.*

and England into the Kingdom of Great Britain in 1707. Despite occasional interference by Parliament or by the House of Lords, Union with England did not greatly affect the traditional Civilian orientation of Scottish private law. In the nineteenth century, cut off from Continental influence first by war and then by the tide of codification, Scots law, after the Napoleonic Wars, was more exposed to the pressures and blandishments of English legal doctrine.

As a result the Civilian tradition and inspiration of Scots law are greatly weakened through the adoption or imposition of English doctrines. These are often imperfectly understood and inferior on an impartial comparative evaluation, to civilian principles which guided Scots lawyers up to the early nineteenth century. Their successors could with advantage take cross-bearings on their position in many legislatures from other Civilian countries and from the so-called " mixed " systems in particular. I have in mind such questions as " penalties," the scope of error and fraud; the dubious relevance for a Civilian of such categories as " undue influence " and " innocent misrepresentation "; and effect of *justa causa traditionis* in actions of reduction; the scope of *bona fides* (and the credentials of its isolated relation *uberrima fides*); trends towards the unjustified and restricting current tendency to identify *culpa* (which comprises deliberate or careless injury) with the English tort of negligence; the relevance of *animus injuriandi* as a defence to an action passed on insult; inquiry as to whether there is any need to supplement the law of delict by such nominate categories as " conspiracy " instead of generalising the doctrine of *aemulatio vicini*, and so forth. The law of Scotland—thanks to generations of able and learned judges and advocates—has been a vigorous growth, and the authority of the institutional writers preserves the foundations—but some of the superstructure is haphazard, unplanned and juristically exotic.

I have already published in South Africa in memory of the late Professor Jolowicz a paper entitled " The Common

Law Cuckoo "[33] giving an account of how English legal influence tends to infiltrate a Civilian system when political, economic and linguistic factors favour its reception—and when the legal ethos of the Civilian system in question is not adequately safeguarded by a vigorous, vigilant and progressive system of legal education for those who are to make, argue and enforce the laws. Deliberate and deliberated acceptance of certain doctrines and institutions of English law may be, and has, in some instances, been beneficial. The haphazard use of English precedents and textbooks to deal with particular instances may be most damaging to the whole fabric of a Romanistic system. Such anyway has been the experience of Scots law. Over the past century and a half the law of Scotland has been isolated and exposed to influences which have threatened the viability of the system. I am convinced that the only sure remedy for this is a reappreciation of the Civilian principles upon which the Scottish legal system is based—and these are substantially the same as in South African law, at all events in fields such as obligations and moveable property.

Lord Normand has stressed[34] that in Scotland the primary study of Roman law should not be in the antiquarian or interpolationist tradition. Such a study provides a fascinating field for the pure scholarship of giant intellect, and, after dilution, is a valuable academic discipline for students of legal history—especially in countries with codified Civilian systems or under the Anglo-American common law. I venture to think in Scotland and in South Africa, where there is no civil code, we are primarily concerned with the evolved Romanistic law which, as Lord Normand puts it, is " an active principle of natural growth and development " of our legal systems *today*—not yesterday nor yesteryear.

Lord Normand's warning was given after the Civilian tradition of Scots law had been undermined and seriously threatened. The main responsibility for stimulating a new attitude of mind and for orientating the legal development of the twentieth century in the Civilian tradition rests upon the law schools of the universities. In my inaugural lecture at Edinburgh University[35] I attempted to assess generally and in detail the challenge of our times to the viability of Scots law as a Civilian system. There is no room for false optimism or complacency. Neither time nor circumstances are favourable. Faith in the value of that system or its merits—not on chauvinistic grounds—and tremendous effort alone can save it.

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[33] Butterworths S. A. Law Review (1956) 147; see also " English Influences on the Law of Scotland," Am.J.Comp.Law 3 (1954), 522.

[34] In 1937 Foreword to J. Spencer Muirhead, *Roman Law*.

The most refreshing thought which has cheered me in contemplating the immensity of the task confronting the Scottish Law Faculties is that great advances in communications have made possible closer academic contact than ever before—not only with Europe as in the past—but also with lawyers and scholars in countries and continents remote from Scotland which share problems similar to our own—with lawyers and scholars of Louisiana in the United States, with those of Quebec in Canada (both, however, countries of Codified law) and, above all, of course, with those of South Africa. In this second centre of the Roman-Dutch law I have found myself, so to speak, *in patria*—so far as private law is concerned—as did our forebears long ago in Leiden or Utrecht. I recall with deep thankfulness that in the years 1958 and 1959 I had the privilege of lecturing at Cape Town and at the Witwatersrand, at Stellenbosch and Grahamstown—and of meeting many learned and distinguished personalities concerned with the law in all its aspects. Leading South African treatises like Wessels on *Contract* and McKerron on *Delict*, Lee's *Introduction to Roman-Dutch Law*, and Lee and Honoré on *Obligations* (the last-mentioned was highly praised by the late Lord Cooper in an anonymous review) and in particular the legal journals published in South Africa, are invaluable for taking cross-bearings on contemporary problems of Scots law. I am glad to say that the exchange is not one-sided. South Africa has had in the past Scottish judges such as Menzies (friend of Walter Scott), Morice and Dove Wilson; also Scottish professors such as Kerr Wylie and McKerron. The Scottish Institutional writers are cited frequently in the South African courts. In recent years we in Scotland have welcomed legal scholars from South Africa to our universities. We look forward to the arrival in Scotland from South Africa of Professor Hahlo of the Witwatersrand and Professor Price of Cape Town. Professor Beinart is due to come over in 1961 and Professors de Wet and Scholtens in 1962. In the years ahead I predict with confidence that we shall profit by a constant flow of experts in Roman and Roman-Dutch law from South Africa to Scotland.

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[35] 1959 J.R. 119.

For over a century and a half direct contacts between Scots lawyers and the experts in Roman-Dutch law were broken. Much even of the literature which had nourished both systems was consigned to oblivion in Scotland, especially after pleading by written cases was abolished in 1850. Under the Parliament House in Edinburgh—where the Parliament of Scotland once sat and where the Supreme Courts of Scotland sit today—until recently thousands of volumes lay neglected in dust and decay. These were the works of the great Civilian commentators up to the end of the eighteenth century—when Scots law was cut off from the direct stimulus of European influence. To visit these stack rooms was like walking in a graveyard. But the works were to see glorious resurrection. Through the great generosity of the Pilgrim Trust a sum of money was provided to rebind and renovate a substantial number of these treatises as a memorial to the late Lord Macmillan, and Professor Walker of Glasgow (who had undertaken a careful and laborious preliminary survey of the material) and I were charged with the selection. Already a large number of volumes, magnificently rebound, have been set in a place of honour in the Corridor of the Advocates' Library. All the material is available for research into the historical sources from which Scots law developed. Thus in Scotland there is stimulus for a reawakened interest in the shared heritage of Scots and Roman-Dutch law.

Nor is this all; we in Scotland should be anxious to keep in closer touch than hitherto with the contributions which South African lawyers are making in the field of legal literature; and I hope that there will be a frequent exchange of ideas in the University legal journals of South Africa and Scotland. In recent years, Aberdeen and Edinburgh Universities at least have taken steps to equip themselves with South African reports and legal journals. This year, the Faculty of Advocates has supplemented its South African materials with a series of Reports. South African and Roman-Dutch treatises are accessible to all who practise in the Court of Session and in other large cities in Scotland.

Here, may I note the remarkable contribution made to creative legal writing by the legal scholars and practising lawyers of South Africa—a body less numerous than the profession in Scotland. Principal Duminy of Cape Town University seized the opportunity of a recent important academic and legal occasion to stress that[36] "for any university to be worthy of the name today and for the foreseeable future, it is absolutely essential that it strive continually for a position of pre-eminence in post-graduate education and research, and it should be encouraged and supported in that endeavour." I am glad to observe that an increasing number of research students are at work in Scotland's Law Faculties.

In September 1959 the University of Cape Town celebrated the Centenary of the establishment of its Law Faculty—and a notable century of achievement it has been. I was privileged to participate in the Centenary Conference and other ceremonies. During the Centenary proceedings the special ties between what is best in South

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[36] At Honorary Graduation Ceremony to commemorate the Centenary of the Law Faculty of Cape Town University, Sept. 5, 1959.

African culture and that of Scotland—particularly in the field of law—were fully and generously stressed by the Chancellor[37] (a former and most distinguished Chief Justice of the Union), by the Principal, and by the Faculty of Law.[38]

Let me, in conclusion, face frankly a doubt which some of you may have entertained regarding the value of strengthening contacts with South African law. There are aspects of current political policy in South Africa which are distasteful to many present here tonight. In this connection, do not forget that it is in the universities, and among lawyers bred in a high professional tradition, that the claims of justice have been most strongly asserted during dark periods of mankind's political history. The flowering of legal culture in the field of private law can coincide with grave defects in the Constitution. Classical Roman law flourished under the vilest of Emperors; the classical era of Scots law fell in a period overshadowed by political humiliation, which was at times alleviated by sharp practice in political management. The pages of Cockburn do not create the impression that party politics in Scotland were any better in the eighteenth century than today. It is clear that the principles of academic freedom and independence of the legal profession have never been more important in the Union of South Africa than they are today. Let none here venture to discount at the present time the achievement of the South African universities as centres of legal learning and bastions of justice and liberty. The legal profession stands in an exposed position courageously maintained, and—in the field of private law particularly—contemporary legal scholarship, valued both by the Bench and the Bar, is stripping the basically Romanistic system of South Africa of unseemly and inelegant excrescences derived from the relative immaturity of Anglo-American common law.

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[37] Hon. A. van de Sandt Centlivres.

[38] *e.g.*, *Acta Juridica*, 1959, at pp. VII and X.

We can learn much from these South African lawyers; and what we give in return intellectually and spiritually could refresh and encourage those who strive in court-house and chambers, and in public life generally, for the enlightenment of the Dark Continent.

T. B. Smith.

ASTREINTES IN FRENCH LAW: THE CONCLUSIVE CASE

THE judgment given on October 20, 1959, by the *Chambre Civile, 1ère Section Civile*, of the *Cour de Cassation* seems to be the conclusive case on the disputed matter of *astreinte*. Controversies which this procedure has provoked, and the divergent solutions of the case law, have already been discussed in *The Juridical Review* (1959, p. 163). Several courts, following the solution of the *2ème Section Civile* of the *Cour de Cassation*, concluded that *astreinte*, either definitive or provisional, should be regarded as pure damages for delay. Thus liquidation of the *astreinte* might not be fixed at a higher amount than the loss suffered by the obligee. (Cour de Cassation, Chambre Civile, Section Sociale, June 13, 1958—(1958) G.P. II Sept. 16; (1958) R.T. Vol. 57, p. 615, n° 38—Cour de Cassation, Chambre Civile, 2ème Section Civile, November 7, 1958—(1959) G.P. I 39; (1959) R.T. Vol. 58, p. 331, n° 42.) Though the actual legality of *astreinte* procedure was no longer questioned, its power of coercion, and thus its utility, had been eliminated.

Going back to a former tradition, the *1ère Section Civile* of the *Cour de Cassation* has condemned this interpretation. (Cour de Cassation, Chambre Civile, 1ère Section Civile, October 20, 1959—(1959) D.J. 537 note G. Holleaux; (1959) S.J. 225; (1960) R.T. Vol. 59, p. 116, n° 28.) On December 10, 1956, the Court of Riom had liquidated a comminatory *astreinte*, calculated by reference, not to the harm suffered, but to the reluctance of the debtor. The *1ère Section Civile* approved of this decision, and has expressly stated that condemnation to an *astreinte* is not to be considered as a condemnation to damages, but as a provisional threat. It is to be fixed according to the recalcitrance of the obligor, not by reference to the loss caused or to be caused. " The provisional *astreinte*," the court said, " is a measure of coercion entirely distinct from damages. Since its real object is only to overcome recalcitrance on the part of a defender who has failed to comply with the terms of judgment against him, the *astreinte* does not aim at compensating the loss caused by the delay and is normally liquidated according to the gravity of the fault of the reluctant debtor having regard to the means at his disposal."

This statement of principle regarding the comminatory *astreinte*—since *astreinte* can have but one nature—is certain to be extended to non-comminatory *astreinte*. It may be added that this judicial solution (which maintains *astreinte* as an autonomous institution, distinct from damages, and thus saves very useful procedure) has the support of most leading writers on the subject.

NICOLE CATALA.

CASES AND COMMENT

1. SCOTTISH CASES

REPARATION—Executor's title to sue.

Smith v. *Duncan Stewart & Co.*, 1961 S.L.T. 2, has settled satisfactorily a matter of long-standing doubt. The facts were simple; a workman was injured in the course of his employment, intimated a claim of damages against his employers, and then died, before he had actually raised an action to enforce his claim. His executor raised an action claiming damages for personal injuries and loss of earnings sustained in consequence of the accident, *i.e.*, for the losses which the deceased could have recovered if he had survived. *Leigh's Exrx.* v. *Caledonian Railway Co.*, 1913 S.C. 838; 1913 1 S.L.T. 373, had held such a claim competent, but doubts were cast on the soundness of *Leigh's Exrx.* by the House of Lords in *Stewart's Exrx.* v. *L. M. S. Railway Co.*, 1943 S.C.(H.L.) 19; 1944 S.L.T. 13, where the issue was not whether an executor could initiate a claim already intimated, but whether an executor could bring an action *ab initio*. A court of seven judges overruled *Leigh's Exrx.*, as having been wrongly decided, and dismissed the executor's action as irrelevant, in so far as it claimed *solatium* for personal injuries.

It is unfortunate that the Lord President in his analysis of the cases mentions that this type of claim in Scots law has developed from the *actio injuriarum* of the Roman Law. It owes much more to the *actio legis Aquiliae*, for the *actio injuriarum* was confined to wrongs to honour, reputation and personality. The court pointed out that citation of the defender in an action was a public and significant act, unlike merely intimating a claim by letter, and that it had the effect of litiscontestation, changing the quality of his claim. It was not merely a matter of whether or not the injured person had indicated an intention to recover damages, which could have been done by raising an action, writing a letter, speaking to a trade union official or a representative of the defender's insurers or in even more ambiguous ways. Litiscontestation is the real and fundamental reason for permitting an action to be continued and for refusing to let an executor commence an action. This is a sound decision well based on principle and has eliminated an anomalous and ill-founded decision from our law.

The position is now, therefore, that, *quoad solatium*, an executor can continue an action already raised by the deceased, but cannot bring an action himself either *de novo*, or on the basis of a claim merely intimated by the deceased prior to his death. *Quoad* patrimonial loss, on the other hand, an executor can always bring, or continue, an action, and the subsequent stage of this same litigation, reported at 1961 S.L.T. 67, shows that the executor was permitted to insist in the action to that extent. This view is consistent with principle and with the recent decision in *Muir's Tr.* v. *Braidwood*, 1958 S.C. 169; 1958 S.L.T. 149, that a trustee in bankruptcy had no title to sue for *solatium* for personal injuries sustained by the bankrupt.

D. M. W.

DIVORCE—Cruelty—Defender insane.

In *McKenzie* v. *McKenzie*, 1961 S.L.T. 22, a wife sought a divorce from her husband on the ground of cruelty. It was pleaded in defence that when the acts of cruelty were committed the defender was insane. At the time of the action, and for three years before, the defender had been under care and treatment in a mental hospital as an insane person, and when charged with an assault on the pursuer he had been found to be, for the purposes of the criminal law, of unsound mind and not responsible for his acts. Lord Walker pointed out that it had been held in England that insanity in terms of the McNaghten Rules is a defence in the criminal courts and also in the divorce courts: *Swan* v. *Swan* [1953] P. 258; *Palmer* v. *Palmer* [1955] P. 4, and that the principles of the law of divorce for cruelty have been said to be the same in both countries, and then held that, if such was the test, the defence of insanity had not been made out on the evidence. But the issue was whether the McNaghten Rules were part of Scots law. His Lordship rightly rejected them, as being " no longer part of our law." Were they *ever* part of Scots law? Certainly they are not *now* Scots law. He held further that certifiable insanity could not at common law import legal irresponsibility. This seems right. The fact that the defender has been certified would not be conclusive on the issue of his civil responsibility or irresponsibility, a matter which is not normally in issue when certification is being considered. In any event his Lordship was satisfied that " enough has been proved both during and after cohabitation to amount to cruelty . . . if cohabitation were resumed now or in future that would probably be detrimental to the defender's mental health and dangerous to the pursuer's life," so that, independently of the issue of irresponsibility, he was entitled to grant decree, as he did.

Also Lord Walker took the view that the defender's irresponsibility in criminal law was not a defence to a charge of cruelty for the purposes of divorce. There is no reason why there should not be two standards for judging irresponsibility for these very different legal purposes. What this case does not do, however, is to try to formulate in words the test for judging irresponsibility for the purposes of divorce on the ground of cruelty, and possibly for other civil purposes also.

D. M. W.

DIVORCE —Cruelty— Defender irresponsible.

An almost indistinguishable case is *Breen* v. *Breen*, 1961 S.L.T. 185, where Lord Cameron came to an opposite conclusion and refused divorce: he held that the defender could not be held responsible for his actions by reason of unsoundness of mind, and was therefore not guilty of cruelty. He agreed with the view expressed by Lord Walker in *McKenzie* that the McNaghten Rules were no part of Scots law.

The difference between the two cases seems to be this: in *McKenzie*, certifiable insanity and criminal irresponsibility were held not *per se* to import civil irresponsibility for the purposes of a defence to a charge of cruelty; in *Breen*, unsoundness of mind in the shape of " schizophrenia to such an extent that there was a total alienation of his reason " did import civil irresponsibility for those purposes. The difference between the cases is one of fact, of the degree and extent to which the defender's mind has been affected by the mental illness from which he suffered. In considering this question of fact the McNaghten Rules are not relevant because they were framed with reference to criminal liability, probably never were accepted or applied even within that sphere in Scotland, and are certainly not the modern law (*cf. H.M. Advocate* v. *Kidd*, 1960 J.C. 61; 1960 S.L.T. 82). Nor is the question whether the defender has been certified insane or not conclusive, because certification is intended for the protection and treatment of the *incapax* and the protection of his relatives and society. The question is probably always whether the defender, in committing the acts of cruelty, was capable of realising that his conduct was cruel: in *McKenzie* he was; in *Breen* he was not. Irresponsibility for one's actions is a defence to a charge of cruelty, but it must be proved and it may fail on the facts, as it did in *McKenzie*.

D. M. W.

NULLITY OF MARRIAGE—"Sham" marriage.

Nullity of marriage on the ground that there was no consent to marry is unusual. It arose in *Orlandi* v. *Castelli*, 1961 S.L.T. 118, where the averments were that the woman had gone through a registry office marriage with a man, whose usual residence was in Italy, solely to enable the man to remain in Scotland. The parties never cohabited, and the pursuer alleged that there was no true matrimonial consent exchanged. The man did not defend the action, was back in Italy, and the parties were no longer on friendly terms. They were both Roman Catholics and neither of them regarded the registry office ceremony as a marriage. The Lord Advocate, to whom the action was intimated, lodged defences and sought to have the action dismissed as irrelevant. The court, however, allowed a proof before answer to allow the facts to be fully established, notwithstanding that all the prerequisites and formalities required by the Marriage (Scotland) Act, 1939, had been complied with. This seems right, as the absence of matrimonial consent, if proved, would be a fundamental defect. It is to be hoped that, when the facts have been established, a further discussion will elucidate the competency of granting declarator of nullity in such a case.

D. M. W.

ALIMENT—Willingness to adhere.

In *Jack* v. *Jack*, 1961 S.L.T. 72, a wife claimed aliment from her husband, but did not seek his adherence nor did she aver that she was herself willing to adhere to him. Lord Guest dismissed the action; the husband's duty to support his wife was correlative to the wife's duty to adhere to him; if she was not willing to adhere or was in desertion she was not entitled to aliment. The case of adultery (*Donnelly* v. *Donnelly*, 1959 S.C.

97; 1959 S.L.T. 327) is clearly, as his Lordship pointed out, distinguishable, because an act of adultery does not necessarily destroy her willingness to adhere. Adultery is unilateral, desertion bilateral in that it involves a deserting spouse and a spouse willing to adhere. This decision is also consistent with common sense; must a wife be supported by her husband when she will neither receive him nor adhere to him?

D. M. W.

INTERDICT —Whether competent alone.

Exchange Telegraph Co., Ltd. v. *White*, 1961 S.L.T. 104, settles a disputed point of practice, whether it is competent in a Court of Session action to conclude, apart from expenses, only for interdict and interim interdict. Lord Cameron reviewed the authorities and held that a conclusion for interdict alone was, under the pre-1933 procedure, and still is competent, without the need for any declaratory or executory conclusion. The modern opinion, that interdict is never concluded for alone, is therefore unfounded, and it is very satisfactory to have this small point cleared up.

D. M. W.

CRIME— Causing death by dangerous driving.

The Road Traffic Act, 1956, s. 8 (1), introduced the statutory offence of causing death by the dangerous driving of a motor-vehicle, because, it is said, of the reluctance of juries to convict a motorist of culpable homicide (or manslaughter). The new offence seems to stand in the hierarchy of crimes below culpable homicide in gravity, yet above reckless driving not causing death. In *Dunn* v. *H.M. Advocate*, 1960 J.C. 55; 1961 S.L.T. 106, the question of the distinction between culpable homicide and this new offence arose, and of the appropriate directions to the jury. Dunn was charged with (a) culpable homicide, or alternatively (b) with causing death by dangerous driving, and (c) with driving while under the influence of drink. The jury found him not guilty of (a), guilty of (b) and not proven on (c). It was argued on appeal that there was no real distinction between (a) and (b), so that he should have been acquitted on both (a) and (b). The High Court approved the directions of the trial judge (Lord Guest) and dismissed the appeal. The burden of proof on the Crown on charge (b) was not so exacting as on charge (a); causing death is not, that is, an equivalent of culpable homicide, but is a weaker alternative crime which requires a lesser degree of *mens rea*, not the " gross or wicked or criminal negligence . . . [or] criminal indifference to consequences " required for culpable homicide, but merely " reckless or dangerous driving." This view seems in accordance with the known intention of Parliament in passing the 1956 Act, with the wording of section 8 (1) as contrasted with the formulations of culpable homicide in case law, and with the different penalties, in the court's discretion for culpable homicide, but not more than five years' imprisonment for the statutory offence. The opposite view, that the statutory offence was a crime of the same standard as culpable homicide, would make the section redundant or at least merely confusing, and fail to surmount the difficulty of the reluctance of juries.

D. M. W.

SPECIFICATIO —Stolen property —Whether defect in title purged.

It is unfortunate that in *McDonald* v. *Provan* (*of Scotland Street*) *Limited*, 1960 S.L.T. 231, counsel did not bring to the notice of the court a fuller review of the relevant authorities.

The facts of the case may be briefly summed up as follows. The pursuer had purchased from the defenders a motor-car which the defenders had previously acquired in bona fide from a Mr. Feldman. Mr. Feldman had had the front part of a vehicle, stolen by him or an associate, welded to the rear portion of another. Subsequently, the police removed the composite vehicle from the pursuer's possession, on the ground that it was stolen property.

The pursuer accordingly brought an action of damages on the ground that the defenders were in breach of the condition implied by section 12 (1) of the Sale of Goods Act, 1893, that they had a right to sell the vehicle.

The defenders invoked the doctrine of *specificatio*, contending that the welding created a new entity, the right of property in which belonged wholly to Mr. Feldman, the person who had arranged the operation. The Lord President rejected their argument, on the ground that, prima facie, a vehicle constructed by welding together two halves could be cut into two once more, so that, in his view, Mr. Feldman had not created a new entity.

Even if it were conceded that a new entity was created, Mr. Feldman's absence of bona fides would exclude the doctrine, as the true owner of stolen property may follow and recover such property from any subsequent holder.

The absence of case-law on this problem is perhaps indicative of the success with which thieves dispose of stolen goods, either in the state in which they acquired them, or after " cannibalisation " as integral parts of other articles, as in this instance.

The treatment of industrial accession by the Civilian and Institutional writers is on the whole expressed in general terms and unsystematically. In dealing with its various manifestations, *e.g.*, *specificatio*, *confusio*, *commixtio*, *adjunctio*, and contexture, they are by no means clear about the appropriate classification of a given set of circumstances. In the present case, arguments may be made to classify them under *specificatio* or *adjunctio*. Nor are these authorities agreed as to the influence, if any, of mala fides. So it seems that the way is open to our courts to exercise their discretion in favour of a solution in keeping with the social and economic needs of today.

Voet, for example, following Justinian, Inst. 2,1,25, holds, 41,1,21, that a new type, manufactured partly from the specificator's material and partly from another's, belongs to the specificator. To Voet, it did not matter whether the specificator was in good or bad faith, and in this he differed from Grotius, 2,8,2, who would deprive the specificator in mala fide of both his own material and his labour. Grotius' view is accepted by Professor Wille in his *Principles of South African Law*, 4th ed., p. 171.

Voet also follows D.6,1,23,5, when he expresses the view, 41,1,27, that accession follows welding, as distinct from soldering, so that an arm welded onto a statue passes to the owner of the statue and does not return to the former owner if subsequently it breaks off. But he is silent here as to the effect of bad faith.

In South Africa it has been held, in *Cooper* v. *Jordan*, 4 E.D.C. 181, that wheels fixed to a wagon by their owner become the property of the owner of the wagon.

Stair, 2,1,39, accepted the Roman rule that the inherent *labes* of materials stolen did not hinder their accession and appropriation by contexture.

A problem which arises in questions of accession is that of deciding which is principal and which is accessory. It is perhaps unwise to lay down any settled rule. But the Roman rule with regard to *specificatio* indicated above and accepted by Voet might well prove a serviceable guide for questions of ownership in industrial accession in general.

In the present case the defenders would have thus acquired a good title to the motor-car from Feldman. Feldman's bad faith would then raise an issue only between himself and the former owner of the stolen car. Stated more realistically, the issue would in fact be between Feldman and the former owner's insurers, to whom monetary recompense is probably more satisfactory than pieces of the vehicle stolen.

One can visualise, for example, a composite vehicle produced by dishonestly " cannibalising " several motor-cars, say four or five. It may well be consonant with public policy that a good title should then pass to an eventual purchaser. The problem of properly identifying the original ownership of smaller, unmarked, parts seems insurmountable.

H. McN. H.

2. ENGLISH CASES

DAMAGES—Permanent injury to brain of an infant.

In *Oliver* v. *Ashman* [1960] 3 W.L.R. 924, Lord Parker C.J. was faced with the difficult problem of assessing damages due to a child aged 20 months who sustained permanent injury to the brain in a road accident rendering him a mental defective. He eventually assessed the damages at £11,000 holding that the boy was entitled to compensation for future loss of earnings, and loss of enjoyment of the amenities of life whether he knew of them or not. It was observed, however, that this latter item must be less than if he had known of them. (This would seem to correspond to a Scottish award of *solatium*.) Lord Parker C.J. also held that consideration of whether the child would ever be able to use the money awarded was irrelevant and that he should receive such a sum as would enable him, at any rate for a time, to live in an institution. The fact that expectation of life had been reduced was, however, ignored in the assessment of damages following the decision of Streatfeild J. in *Pope* v. *D. Murphy & Son, Ltd.* [1960] 2 W.L.R. 861.

W. A. E.

MINES AND QUARRIES ACT, 1954, S. 48 (1)—Whether absolute duty.

Section 48 (1) of the Mines and Quarries Act, 1954, provides that " it shall be the duty of the manager of every mine to take, with respect to every road and working place in the mine, such steps by way of controlling movement of the strata in the mine and supporting the roof and sides of the road or working place as may be necessary for keeping the road or working place secure: . . ." In *Brown* v. *National Coal Board* [1960] 3 W.L.R. 892 it has now been held that this does not impose an absolute duty on the manager and that in the circumstances a manager had taken all necessary steps to keep the road secure albeit an accident had happened. It was secure until a tub knocked away the prop supporting a girder and when a state of insecurity resulted, immediate steps were taken to remedy the situation.

W. A. E.

CORRECTIVE TRAINING—Proof of previous convictions in Scotland.

Subsections (1) (*b*) and (2) (*b*) of the Criminal Justice Act, 1948, provide that before a convicted person can be sentenced to corrective training, prima facie evidence must be given that the previous convictions qualifying him for such a sentence were in respect of offences punishable on indictment with imprisonment for two years or more. In *Regina* v. *Clarkson* [1961] 1 W.L.R. 347 it was held that where a convicted person was sentenced to corrective training on proof of previous convictions in Scotland—but without any evidence that those convictions were in respect of offences punishable on indictment with imprisonment for two years or more—the conviction could not stand.

W. A. E.

ILLEGAL CONTRACT—User requiring planning permission.

An interesting question arose in *Best* v. *Glenville* [1960] 1 W.L.R. 1198 as to whether the letting of a building for a purpose requiring planning permission without the obtaining of such permission was an illegal contract. Ground-floor premises were let as a club and although a subsequent effort was made to obtain planning permission this was refused. When the landlord subsequently sued for rent the lessee endeavoured to maintain that the contract of lease was an illegal one and that no sum could therefore be recovered thereunder. But the court held that the letting of the premises for use as a club, on the understanding that planning permission would be applied for by the defendant, was letting for a legal purpose and that the landlord was therefore entitled to his rent. No attempt appears to have been made to plead frustration.

W. A. E.

3. PRIVY COUNCIL CASES

NEGLIGENCE: **Foreseeability of consequences: test of liability.**

Overseas Tankship (U.K.), Ltd. v. *Mort's Dock and Engineering Co., Ltd.* (*The Wagon Mound*) ([1961] 2 W.L.R. 126) was an appeal from an order of the Full Court of the Supreme Court of New South Wales dismissing an appeal by the appellants, Overseas Tankship (U.K.), Ltd., from the judgment of the trial judge, exercising Admiralty jurisdiction, in an action in which the respondents, Mort's Dock and Engineering Co., Ltd., as plaintiffs, sought to recover from the appellants, as defendants, compensation for the damage which the respondents' property known as Sheerlegs Wharf, in Sydney Harbour, and the equipment thereon, had suffered by reason of fire which broke out on November 1, 1951. The respondents claimed that the appellants were in law responsible for that damage.

The respondents carried on the business of shipbuilding, ship-repairing and general engineering. They owned Sheerlegs Wharf, and in October and November, 1951, the *Corrimal* was moored alongside the wharf and the respondents were refitting her, using electric and oxy-acetylene welding equipment. At the same time the appellants were charterers by demise of the *Wagon Mound*, an oil-burning vessel, which was moored at another wharf from about 9 a.m. on October 29 till 11 a.m. on October 30, 1951, for the purpose of discharging gasolene products and taking in bunkering oil. During the early hours of October 30 a large quantity of bunkering oil was, through the carelessness of the appellants' servants, allowed to spill into the bay, and by 10.30 a.m. it had spread over a considerable part of the bay, being thickly concentrated in some places and particularly along the foreshore near the respondents' property. The appellants made no attempt to disperse the oil. The *Wagon Mound* set sail very shortly after. The respondents' works manager had inquired of the manager of the oil company—at whose wharf the *Wagon Mound* was still berthed—whether they could safely continue operations on their own wharf and on the *Corrimal.* The results of the inquiry, coupled with his own belief as to the inflammability of furnace oil in the open, led him to think that the respondents could safely carry on their operations. He gave instructions accordingly, but directed that all safety precautions should be taken to prevent inflammable material falling off the wharf into the oil. For the remainder of October 30 till about 2 p.m. on November 1 work was carried on as usual, the congestion of the oil remaining substantially unaltered. But at about that time the oil under or near the wharf was ignited and a fire, fed initially by the oil, spread rapidly and burned with great intensity. The wharf and the *Corrimal* caught fire and the wharf and the equipment on it were considerably damaged.

The judge found that the outbreak of the fire was due to the fact that there was floating in the oil underneath the wharf a piece of débris on which lay some smouldering cotton waste or rag which molten metal falling from the wharf had set on fire; that the cotton waste or rag burst into flames; that the flames from the cotton waste set the floating oil afire either directly or by first setting fire to a wooden pile coated with oil, and that after the floating oil became ignited the flames spread rapidly over the surface of the oil and quickly developed into a conflagration which severely damaged the wharf.

The Board stated that the trial judge also made the all-important finding that: " The *raison d'être* of furnace oil is, of course, that it shall burn, but I find the defendants did not know and could not reasonably be expected to have known that it was capable of being set afire when spread on water." That finding, which was reached after a wealth of evidence, received strong confirmation from the fact that at the trial the respondents strenuously maintained that the appellants had discharged petrol into the bay on no other ground than that, as the spillage was set alight, it could not be furnace oil. An attempt was made before the Board to limit in some way the finding of fact, but it was clear that it was intended to cover precisely the event which happened. The judge also held that apart from damage by fire the respondents had suffered some damage from spillage of oil in that it had got on their slipways and congealed on them and interfered with their use of the slips. The evidence of that damage was slight and no claim for compensation was made in respect of it. Nevertheless it did establish some damage, which might be insignificant in comparison with the magnitude of the damage by fire, but was damage which, beyond question, was a direct result of the escape of oil. It was on that footing that the Board would consider the question whether the appellants were liable for the fire damage.

In *Re Polemis and Furness Withy & Co.* ([1921] 3 K.B. 560) the Court of Appeal plainly asserted that, if the defendant was guilty of negligence, he was responsible for all the consequences of his negligent act. The generality of the proposition was perhaps qualified by the fact that each of the Lords Justices in that case referred to the outbreak of the fire as the direct result of the negligent act. The Board referred to a number of decisions and stated that enough had been said to show that the authority of *Polemis* had been severely shaken though lip service had from time to time been paid to it. In their opinion it should no longer be regarded as good law. It did not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which resulted in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they could be said to be "direct." It was a principle of civil liability, subject only to qualifications which had no present relevance, that he must be considered to be responsible for the probable consequences of his act. To demand more of him was too harsh a rule, to demand less was to ignore that civilised order required the observance of a minimum standard of behaviour.

On that part of the case the Board had been concerned primarily to displace the proposition that unforeseeability was irrelevant if the damage was "direct." In doing so they had inevitably insisted that the essential factor in determining liability was whether the damage was of such a kind as the reasonable man should have foreseen. That accorded with the general view thus stated by Lord Atkin in *Donoghue* v. *Stevenson* ([1932] A.C. 562, at 580; 1932 S.C.(H.L.) 31, at 44; 1932 S.L.T. 317, at 323): "The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay." It would be a departure from that sovereign principle if liability were made to depend solely on the damage being the " direct " or " natural " consequence of the preceding act. Who knew or could be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was " direct " or " natural," equally it would be wrong that a man should escape liability, however " indirect " the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done. Thus foreseeability became the effective test. The direct consequence test led to nowhere but the never-ending and insoluble problems of causation. It was no doubt proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant and consequent damage. But there could be no liability until the damage had been done. It was not the act but the consequences on which tortious liability was founded. In *King* v. *Phillips* ([1953] 1 Q.B. 429, at p. 431) Lord Justice Denning said: " There can be no doubt since *Bourhill* v. *Young* (1942 S.C.(H.L.) 78; 1943 S.L.T. 105; [1943] A.C. 92) that the test of *liability for shock* is foreseeability of *injury by shock*." The Board substituted the word " fire " for " shock " and endorsed that statement of the law. On the footing that the damage in the present case was the direct result of the escape of the oil, and applying the test of foreseeability, the appellants, who, as the trial judge found, could not reasonably have been expected to have known that the oil would catch fire, were not liable for the damage.

It had not been necessary to consider the so-called rule of " strict liability " exemplified in *Rylands* v. *Fletcher* ((1868) L.R. 3 H.L. 330), and the cases which followed or distinguished it. Nothing that had been said was intended to reflect on that rule. The appeal would be allowed, and the respondents' action, so far as it related to damage caused by the negligence of the appellants, be dismissed, but the action, so far as it related to damage caused by nuisance, would be remitted to the Full Court to be dealt with as that court might think fit.

SALE OF GOODS: Authority of agent: Reliance on seller's skill and judgment.

Council of the Shire of Ashford v. *Dependable Motors Pty., Ltd.* ([1960] 3 W.L.R. 999) was an appeal from a majority order of the High Court of Australia, reversing a majority decision of the Supreme Court of New South Wales and restoring an order which the trial judge made in favour of the present respondents, the defendants in the action. The appellants ordered from the respondents, a motor-tractor with accessories. The tractor was duly delivered. The appellants required it for road construction work in their shire and it was used on that work for some time. It developed a number of defects, and the appellants brought an action for damages for breach of the implied condition set out in section 19 (1) of the Sale of Goods Act, 1923–1953, of New South Wales. The defence was that the requirements of that section had not been satisfied. Section 19 (1) [identical in words with those of section 14 (1) of the (British) Sale of Goods Act, 1893] stated: "Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose."

The shire clerk to the appellants heard of a tractor which the respondents had for sale in Sydney. The appellants appointed a new shire engineer, B., who was still employed on other work and did not take up his duties or become the servant of the appellants until after the events with which the present case was concerned. It was to be part of his duty to supervise road construction work, and he had had some experience of that and of the working of tractors in that connection. The shire clerk, knowing that B. was in Sydney, and after consulting the president of the shire council and certain councillors, telephoned to B. and asked him to go and look at the tractor. B. stated in evidence that he called on the respondents and told C., their joint managing director, that he was there on behalf of the shire council, saw the tractor, asked about its capabilities and whether it would do the road construction work for which it was required, which he described, and was told, *inter alia*, that it was "the type of work the tractor is built for. It is just the type of work to suit it." C. denied that B. asked him whether the tractor was suitable, but admitted that he believed that it was suitable for council work and would have said so if he had been asked. B. made no written report of his conversation with C., but he told the shire clerk that the tractor seemed to have plenty of horse-power and was big enough for the work required. The shire clerk communicated that to the various councillors, including the president, and received instructions from the president to buy the tractor. The president was asked whether, in giving those instructions, he relied on B.'s report and he answered: "Yes. I have nothing else to rely on."

The tractor was not reasonably fit for the purposes of road construction, and the argument before the Board was concerned with the question whether the other requirements of the section were satisfied: whether the buyer made known to the seller the particular purpose for which the tractor was required, whether the buyer made that known to the seller "so as to show that the buyer relies on the seller's skill and judgment" and whether the buyer in fact so relied. The respondents' main contentions were, first, that B. had no authority from the appellants to make known to the seller on their behalf the particular purpose for which the tractor was required, and had no authority to place reliance on the seller's skill and judgment, because the sole duty entrusted to him was to make up his own mind about the suitability of the tractor; and, secondly, that, whatever reliance B. might have put on the seller's skill and judgment in deciding what report to make, the buyer (the appellants) could not have so relied if only because no councillor and no servant of the council was aware of what passed between B. and C. when the appellants bought the tractor.

The Board stated that the first question to be decided was the nature and extent of the authority which the appellants gave to B. It must be held that B. was given sufficient authority to enable him to perform the task which was then entrusted to him. In all the circumstances the Board, while recognising that no inference could be drawn with absolute certainty, had come to be clearly of opinion that the proper inference was that B. was being asked to anticipate his duties as shire engineer and to do gratuitously what it would have been his duty to do if he had already become the appellants' servant. B. said in evidence that he told C. that he had come on behalf of the appellants, and C. said that B. had introduced himself as the shire engineer. In the Board's judgment B. was correct. B. was acting within the scope of his authority in disclosing to the seller on behalf of the appellants the particular purpose for which the tractor was required. And if he had authority so to act on behalf of the appellants, that must cover disclosing that purpose so as to show that he was relying on the seller's skill or judgment in making his report to the appellants. C. must have realised that B., in making his report, intended to rely on the assurances which C. had given him, and C. had no reason to suppose that the appellants were not so relying when they placed their order.

The respondents argued that that was not sufficient because in ordering the tractor the appellants did not in fact rely on what had taken place between B. and C. B. never told them about that and a person could not rely on something of which he was ignorant. The respondents found on well-known statements of the law. " Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation " (*Cammell Laird & Co.* v. *Manganese Bronze & Brass Co.* [1934] A.C. 402, *per* Lord Wright at p. 423). " The reliance in question must be such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity " (*Medway Oil and Storage Co., Ltd.* v. *Silica Gel Corporation* (1928) 33 Com.Cas. 195 at p. 196). The respondents argued that what C. said could not have been an inducement leading the appellants to buy the tractor: the appellants relied solely on what B. told them, and he said nothing about his conversation with C.

Such general statements of the law did not deal with the position of a buyer who acted through agents or servants, as a corporation must do. Making known to the seller the buyer's particular purpose might take place during negotiations which preceded the making of the contract for sale, and there need be no reference to that in the contract of sale. What was necessary was that the buyer should contract in reliance on what took place during the negotiations, and that his reliance at the time when the contract was made " is a matter of reasonable inference to the seller and to the court " (*Manchester Liners, Ltd.* v. *Rea, Ltd.* [1922] 2 A.C. 74, *per* Lord Sumner at p. 90). B. conducted the negotiations on behalf of the appellants and the shire clerk made the contract on their behalf. B. was the agent of the appellants when obtaining C.'s assurances. Equally the president and the shire clerk were only their agents when deciding to order and ordering the tractor, and they were induced to do that by B.'s report which was induced by the seller's assurances which B. received on behalf of the appellants. The president was not the appellant corporation, and the Board could not hold that their answer to the question whether the appellant corporation was to be held to have relied on the seller's skill or judgment should be affected by the fact that the president was not told what had taken place between B. and the seller. The requirements of the section had been satisfied and the appeal would be allowed.

REVENUE: Capital or income expenditure.

Ralli Estates, Ltd. v. *Commissioner of Income Tax* ([1961] 1 W.L.R. 329) was an appeal from a judgment of the Court of Appeal for Eastern Africa dismissing the appellants' appeal from a judgment of the High Court of Tanganyika. The question in the appeal concerned the income tax payable in East Africa by the appellants.

After the 1939–45 war the Government of Tanganyika, by the German Property (Disposal) Ordinance, 1948, itself acquired the ex-enemy estates in Tanganyika, included among them being the Lanconi and Mjesani sisal estates. The Government, having become the owner of them, entrusted those two estates to Ralli Brothers, Ltd. At that time Ralli Estates, Ltd., had not been formed. In March 1950 the Government invited applications for the purchase of the estates previously owned by enemy nationals. Ralli Brothers, Ltd., applied to buy some of the estates, and were successful with regard to the Lanconi and Mjesani estates. By letters of September 30 and October 26, 1950, the Government agreed to grant a right of occupancy of those two estates to Ralli Brothers, Ltd., for 99 years from January 1, 1951, at a premium of £311,000, and a royalty on all sisal fibre exported from the two estates up to a total of £174,600, but reducible in certain circumstances. Two months later, however, the formal contract was made, not with Ralli Brothers, Ltd., but with Ralli Estates, Ltd., a wholly-owned subsidiary formed by Ralli Brothers, Ltd., for the purpose.

During the negotiations the payments of £174,600 had been described as " royalties," but in the formal contract they were described as " the balance of the purchase moneys." The payments were to be made by monthly instalments assessed by reference to the tonnage of line sisal fibre produced on the land and exported during the preceding month. The monthly instalments were to " be paid until such time as either the said balance of the purchase moneys [£174,600] is paid or until the fibre tonnage of 19,397 tons shall have been cut and accounted for, whichever shall first occur."

The principal statutory provision was section 14 (1) of the East African Income Tax (Management) Act, 1952, which stated that " for the purpose of ascertaining the total income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year of income by such person in the production of the income." The company made considerable profits in 1951 and 1952 and it was liable to pay income tax on those profits. As it so happened the price of sisal was so high that the £174,600 was paid off in two years.

The company contended that, in calculating its income, there should be deducted several payments which amounted to £174,600 altogether for the years 1951 and 1952. The courts below held that the payments were not revenue expenditure, but capital expenditure, and were not deductible for income tax purposes. The contest between the parties was, shortly, that the company said that the payments, amounting to £174,600, were made up of royalties at so much a ton of sisal exported, and that they were therefore in the nature of a revenue expenditure. The commissioner contended that the payments were part of the purchase price by the company for the two sisal estates, £70,300 being in respect of the Lanconi estate and £104,300 in respect of the Mjesani estate, and that they were therefore capital expenditure.

The Board stated that, to determine the true nature of the payments, it was legitimate to look at the course of the negotiations as well as at the formal contract. The 99-year right of occupancy was a long-enduring right very different from short leases. The royalty was not payable throughout the 99 years but only for an indeterminate period at the beginning, probably only a few years. It was not payable on all sisal fibre produced during the 99 years, but only until the total amount paid was £174,600 or until 19,397 tons of fibre had been exported. The whole amount was paid off in two years. The royalty was not therefore a true royalty. Even on the documents which passed during the negotiations the payments were shown to be paid for a capital asset or at any rate for a capital purpose. In the letter of September 30, 1950, the premium of £311,000 and the royalty of £174,600 together represented the total net capital value, and were obviously paid for the capital asset represented by 99 years' right of occupancy of the unexhausted improvements on the land, including leaf, building, machinery and equipment. Whether that right might be called a lease did not matter. It was a long-enduring interest of a capital nature, and the payment for it was of a capital nature. The fact that a reduced amount was payable in certain circumstances did not alter the nature of the payment. It was still a payment for a capital asset and must be reckoned as a capital expenditure. The formal contract did no more than express the true nature of the payments. It made explicit that which was previously obscured by the use of the word "royalty." The appeal would be dismissed.

4. REPORTS

Tenth Report of the Law Reform Committee for Scotland

The Tenth Report of the Law Reform Committee for Scotland (Cmnd. 1103) deals with two related remits, the title of relatives of a deceased to sue for his death, with special reference to *Laidlaw* v. *National Coal Board*, 1957 S.C. 49; 1957 S.L.T. 125, and the right to sue for solatium for the death of a relative or spouse.

The title of certain relatives to recover damages where a person standing in certain degrees of relationship to them has been killed by the fault of the defender and could, if he had survived, himself have recovered, dates in its modern form from *Eisten* v. *North British Railway Co.* (1870) 8 M. 980, and the title extends to the relatives mentioned in that case, to spouses, ascendants and descendants of the deceased. Later cases have worked out in detail who may and may not sue. The main criterion is: did there exist in life, as between the deceased and the claimant, a mutual obligation of support in case of need? In *Laidlaw* a mother sued for the death of her son, who had been her sole support. Her husband was alive, but had lived apart for years, and expressly renounced his title to sue. The court held that in these circumstances, so long as he was alive, the mother had no title to sue. In reaching this decision, so unfair from a common-sense point of view, the court followed earlier cases, particularly *Whitehead* v. *Blaik* (1893) 20 R. 1045, but expressed the view that the result of following that case was unsatisfactory.

Unfortunately the committee did not seek to consider whether that decision was right or wrong, nor whether it justified the proposition for which it has subsequently been cited, namely, that so long as the father is alive, the mother has no title to sue, even if she has been deserted by him. In the writer's view that decision was correct on its own facts and pleadings, but decided only that the mother could not sue alone, without the father having either concurred or renounced his claim. It did *not* decide that the only title to sue was vested in the husband, and the effect of the Married Women's Property (Scotland) Act, 1881, on title to sue was ignored by the Inner House, though not by the Lord Ordinary, who took the correct view of the law.

The committee now, however, recommends that in view of the principle of connubial equality, the mother should have a title to sue for the death of a child while the father is still alive. *Laidlaw*, and the cases on which that decision was based, should therefore be impliedly overruled. This seems quite unexceptionable. If the reform is effected, as it should be, presumably father and mother would both sue in the same action, if living in family; and if not, the mother would have to call the father for his interest, or obtain his concurrence in her action, or his renunciation of his claim, and conversely. It would not in the ordinary case make much difference since a father's claim is normally in fact, though not in pleading, brought on behalf of his wife as well as of himself. This reform should be made; it would rationalise the law and expunge a series of judicial mistakes.

There has also been some doubt (in the writer's view, quite unjustified) whether a child might sue for the death of its mother while the father was still alive. In practice such claims have been allowed, though a child has in such a case no immediately prestable right to support from the mother, but only a contingent one which would emerge and be exigible on the death of the father. The committee recommends that any doubt on this matter should be removed and that it be made clear that a child has a title to sue in such cases. This equally seems a proper recommendation.

The logical conclusion from the principles enunciated in *Eisten* v. *North British Railway* was drawn in the case of illegitimate relationships, and no action was allowed at common law. The Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, s. 2 (2), gave the bastard a title to sue for the death of either parent, but not conversely, possibly *per incuriam.* The committee now recommends that this anomaly also should be rectified and illegitimate parents and children should each have a title to sue for the death of the other. Again this is a proper reform. There will still be excluded any right of action by the natural father for the death of the natural mother and conversely, and by paramour for the death of mistress and conversely, as is probably the common law.

The other, and related, subject of remit was whether there should continue to be a claim for solatium for the death of a relative. Should a claim, that is, as in the English statutory counterpart, be a claim for patrimonial loss only? The committee recommends no change in the law, and there seems to have been alleged no objection in principle to the practice of making such awards, while awards are normally moderate in amount, about £700 being the upper limit.

It is thought that the conclusions of the committee on both matters dealt with in this report will meet with general acceptance in the profession, and that they should be implemented as soon as convenient and practicable.

D. M. W.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, B.A., LL.B., Advocate, Sheriff-Substitute of the Lothians and Peebles

LAW AND SOCIAL POLICY

Largely perhaps for historical reasons, including the absence in the British Constitution of "those declarations or definitions of rights so dear to foreign constitutionalists,"[1] and because principles of both private and public law are "inductions or generalizations based upon particular decisions pronounced by the courts,"[2] we have been brought up to regard with especial suspicion any sort of statement about human rights or laws of nature. A right not secured by a remedy and a law claiming higher validity than a statute tend to seem useless and even meaningless conceptions. Thus the term "natural justice," when it is employed at all by lawyers, has come to bear a more or less technical and procedural meaning, as an expression indicating the duty of a court to decide a question before it in a proper judicial manner. It comprehends two rules. First, the question must be decided without bias; and secondly, each of the parties must be given an adequate opportunity of presenting his case.[3]

If this is all that "natural justice" means, what need is there, Mr. J. Bennett Miller has asked, for "this high-sounding but troublesome expression at all?"[4] The two requirements of unbiased decision and fair hearing might well be allowed to speak for themselves. There would then be no need for judges and others to devote so much time to discussing the exact content of the principle of natural justice, or to make the painful mental adjustment required in accepting the fact that a principle expressed in such universal terms may vary markedly in its application to differing cases, and may be modified by contract or by statute.

The very vagueness of the principle, however, has the advantage of allowing it to be applied flexibly. "There are certain canons of judicial conduct," declared the Committee on Ministers' Powers (the Donoughmore Committee),[5] "to which all tribunals and persons who have to give judicial or quasi-judicial decisions ought to conform." They did not regard these canons of judicial conduct as having been definitely settled. No doubt, absence of bias and a fair hearing are the two main requirements. It does not follow that they are the only ones. There are some conceptions, like that of "public policy" itself, which it might be said to be a matter of public policy not to define too closely, and natural justice may be one of them.[6] The

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[1] Dicey, *Law of the Constitution* (10th ed.), p. 197.

[2] *Ibid.*

[3] *Per* Lord Haldane in *R.* v. *Local Government Board, ex p. Arlidge* [1915] A.C. 120, 132.

[4] "Problems of Natural Justice," 1960 J.R. 29.

[5] (1932) Cmd. 4060, p. 76.

[6] See *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109, *per* Tucker L.J., at p. 118.

Donoughmore Committee thought that a refusal to give reasons for a decision might, at least in some circumstances, amount to a denial of natural justice,[7] and the Committee on Administrative Tribunals and Inquiries[8] (the Franks Committee) in the same way laid stress on openness, as well as fairness and impartiality, as essential to the procedures with which they were concerned. By "openness" the Franks Committee meant publicity of the proceedings and disclosure of the grounds of decision.[9]

"Openness" in this sense has not yet been recognised judicially as a requirement of natural justice. But it might be, if the principle retains its flexibility. Moreover, there is possibly an additional and separate requirement, to the effect that, not merely must judicial conduct conform to the two canons mentioned, but it must also appear to do so, even though there is no reasonable suspicion of anything improper in the proceedings. "The test is not, has an unjust result been reached, but was there an opportunity afforded for injustice to be done? If so, the decision cannot stand."[10]

Whatever its exact scope may be, the principle of natural justice relates to procedure rather than to substantive law. It would be a vast mistake to believe that it is of minor importance for that reason. We have only to think of the bearing of the writ of habeas corpus in England, and the corresponding provisions in Scotland, on personal freedom. To have a means of controlling tribunals and administrative authorities with quasi-judicial functions is nearly as vital, and this is the purpose which the principle of natural justice, together with the *ultra vires* doctrine, serves. Arbitrary exercise of an administrative power, Professor H. W. R. Wade has remarked,[11] the courts cannot control, since policy is in the last resort arbitrary. He suggests that nonetheless the manner in which the courts have developed the idea of "natural justice," and fastened it on to powers which are purely political, is really a remarkable achievement, in spite of the criticisms of those who think that they might have been more enterprising in controlling administrative powers than they have been. Even if the ultimate decision is one of policy, and so arbitrary, much can be done to ensure that in the preliminary stages the evils arising from arbitrary and irresponsible procedures are prevented.

It is a striking and perhaps a significant fact that the "high-sounding" term "natural justice" is used to denote the canons of judicial behaviour, instead of what Mr. Miller calls its poor relation, "fair play." The latter is constantly in the mouths of lawyers in all sorts of conjunctures, while the former outside a limited sphere is seldom employed and is apt to be referred to, if at all, contemptuously. Is it because a special sanctity attaches to the canons of judicial conduct and they are recognised as fundamental in the sense that they are a pre-requisite of every proper judicial decision? A court, on this view, can never exercise its function, which is to reach a just decision in a controversy brought before it, unless the principles of natural justice are accepted as governing the manner in which it is to set about its work. The adjective " natural " implies that these principles are both essential and permanent in character, being so solidly established by experience that a judicial decision is not to be acknowledged as such without them. The importance of the principles of natural justice does not end there, for they may go a long way to ensure not merely a proper approach to the performance of a judicial function but also a just result. It is only necessary further to find correctly the facts and the law, if any, applicable, assuming, and no doubt it is a large assumption, that the law applicable is itself just.

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[7] *Ibid.*, p. 80.

[8] (1957) Cmnd. 218, p. 5.

[9] *Ibid.*, p. 10.

[10] *Barrs* v. *British Wool Marketing Board*, 1957 S.C. 72, *per* the Lord President at p. 82; 1957 S.L.T. 153, at p. 157; *cf. Cooper* v. *Wilson* [1937] 2 K.B. 309, *per* Scott L.J., at p. 344.

[11] "'Quasi-Judicial' and its Background" (1949) 10 C.L.J. 216.

When people talk of " justice " nowadays it is most often social, or economic, justice they are thinking of. " Preoccupation with justice is the political preoccupation *par excellence* and it is no bad thing that ' social justice ' should be the obsession of our time." [12] That is because the crucial questions discussed concern the justice of established rights. These questions courts of law must regard on the whole as not for them. They have to take an existing rule as they find it, and can only do a little by way of interpretation of the rule to reach what seems to them a just conclusion. Thus, there is, and presumably always will be, a considerable difference between social justice and legal justice, and at times a direct conflict is sure to occur. For example, social justice may be thought to require disproportionately heavy taxation of large incomes and estates, or discrimination against owners of property and in favour of trade unions. From a strictly legal point of view, measures of this kind cannot be considered as other than anomalous. If they are generally recognised as justifiable, that is only because what is socially just is sometimes to be preferred to what is legally just. In the same way, legal justice may come into conflict with moral justice. Law is not necessarily either reasonable or moral, as Dr. Goodhart has observed. But this does not mean that law and morals, though distinct, are separable, and he goes on to demonstrate with admirable vigour and insight the close bond between them.[13]

The sort of justice that courts of law are concerned with, then, is only one sort of justice. Whether it is regarded as inferior or superior to other sorts is a matter of how one looks at human affairs. It would, in any event, be an uncomfortable society to live in where it was invariably either subordinated or preferred to social and moral justice. There would be no incompatibility in an ideal society, but things being as they are it is of course necessary in practice to find a compromise between the different sorts of justice. Lawyers can be excused for believing that the emphasis which is nowadays placed on social justice tends to make people undervalue the other sorts, and that this has some undesirable consequences.

There are different sorts of law, as there are different sorts of justice. There is, for instance, " lawyers' law " and there is what may be called " politicians' law," which everybody agrees is much more interesting. The distinction is not precisely between judge-made law and enacted law, since there are parts of the law, *e.g.*, a large part of criminal law, which are non-statutory and yet can hardly be considered as lawyers' law, while there are rules that continue to be clearly rules of lawyers' law, although they have been altered by or are embodied in a statute. All the same, the great bulk of legislation is far removed from lawyers' law, granting powers to government departments or local authorities, imposing special duties on or giving special rights to particular classes of persons, and in general purporting to carry into effect social policies designed for the public advantage. Lawyers' law, on the other hand, is occupied mainly with defining and developing the established rights and duties of private persons in relation to one another. These are, of course, continually being changed and added to by politicians' law. One result is that courts of law spend an increasing amount of their time in the interpretation of statutes. Another, and less noticeable result, is that politicians' law tends to be transformed into something indistinguishable from or at least akin to lawyers' law, that is to say, it tends to lose its novelty and its controversial character, and to become dull and technical, of interest only to lawyers and persons immediately affected by it. It has been said that "the growing use of law as an instrument of social control and policy in modern society is gradually reducing the sphere of lawyers' law."[14] Certainly lawyers' law has become less prominent as legislation has increased. Whether its sphere has really been reduced may be questioned.

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[12] B. de Jouvenel, *Sovereignty*, p. 139.

[13] A. L. Goodhart, *English Law and the Moral Law* (Hamlyn Lecture).

No one would deny that the use of law as an instrument of social control and policy has grown. It was to be expected that the most influential current theories of law should be sociological, while analytical jurisprudence, which regards law as static rather than dynamic, has declined in favour. The leading jurist of the sociological school declares that he is "content to think of law as a social institution to satisfy social wants—the claims and demands involved in the existence of civilised society—by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect to by an ordering of human conduct through politically organised society."[15] As a description of politicians' law, this is entirely apt. The function of the politician is plainly to satisfy the wants of those whom he represents by enacting the measures demanded by them. But as a picture of law as envisaged by lawyers it is surely distorted.

It is true that courts of law sometimes make new rules of law while pretending merely to be applying old ones, or at any rate that they fit existing rules to new situations in such a way as virtually to create new law. It is also true that, when they create new law in this manner, judges are affected by considerations of policy, and in particular of social welfare and justice. It is both inevitable and legitimate that they should be. Is it, however, credible that, if social welfare were the major factor in their decisions, they could so successfully conceal the fact? When we examine any judgment we discover that it is based on existing rules, and even where a discretionary power is present it must be exercised in accordance with rules. All these rules, indeed, may be derived from human wants. It does not follow, because a rule was originally made to satisfy a want, that it still does so, for that want may be no longer felt or may be opposed by wants which are more compelling and more in accordance with actual needs. Nevertheless, it is the obsolete or slighter want that the existing rule satisfies, and the decision of the court follows the existing rule in spite of the claims of social justice or expediency. The conclusion may be, and has been, drawn that law is an obstacle to human progress and welfare. But most lawyers will not feel obliged to agree, and believe they can find arguments to support them.

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[14] W. Friedmann, *Legal Theory* (4th ed.), p. 464.

[15] Roscoe Pound, *Introduction to the Philosophy of Law*, p. 99.

The majority of judicial opinions, even in the highest courts, probably do not contain so much as an allusion to any issue of social policy. Such an issue is, of course, openly raised at times. Thus, in his celebrated speech in *Donoghue* v. *Stevenson*[16] Lord Atkin referred to the undesirability of denying a remedy to a consumer who was injured by the consumption of an article of food poisoned owing to the negligence of the manufacturer, and observed that he did not "think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy when there is so obviously a social wrong." He did not, however, rest his judgment on the law as he thought it ought to be, but on the law as he thought it was, though possibly he might be suspected of taking a charitable view of the law as it was.

The idea that courts are bound to take the law as they find it seems, indeed, so elementary that it is not easy to contemplate the opposite idea, that is to say, that they are not bound at all, and, if they imagine they decide on the basis solely of existing law, they deceive themselves. The implication of this proposition is that there is no real difference between interpreting a law, or applying it to a particular case, on the one hand, and making a law on the other. It is only a matter of convenience, or accident, or habit, therefore, that one function is usually exercised by a judge and another by a legislator. In either event, it is substantially the same.[17]

The proposition derives some plausibility from the fact that, from the very nature of a law, or a rule of any kind, there is necessarily some latitude and uncertainty involved in applying it to a concrete case. To lay down that every child under the age of sixteen must be educated does not logically entail any unpleasant results for Tom Jones, since it has to be determined that Tom Jones is under sixteen years of age and what is meant by education. Thus, in some degree a legal decision applying the law to a particular case appears to involve the creation of law. It is, however, a fallacy, for law consists solely of rules, and a particular decision cannot, therefore, be a law. It is something wholly distinct, namely the application of a law to certain specific facts. Strictly speaking, it is incorrect to say that a court ever creates new law, at any rate by its decision in the case before it, although the grounds of the decision may yield a principle from which a new rule of law can be deduced.

The sociological theorist is driven to the extravagant conclusion that there is no distinction between making and interpreting a law by his assertion that the aim of law is to satisfy wants. For if that is its aim it cannot also be its aim to create and maintain rights, since rights and wants are often inconsistent. Rights and duties, indeed, as lawyers generally conceive them, do not really exist at all. Nor, for that matter, does law as lawyers generally conceive it. There is nothing but policy, and administrative decisions and regulations for carrying policies into effect. A court of law is merely an agency for the attainment of social purposes, differing from a government department in form and procedure alone, and rights are temporary licences to be granted or taken away again as expediency requires. A law has no greater sanctity than an order emanating from a government office, since it can be overridden or altered as desired by statute, and legislation is nothing but an instrument employed by the government when for some reason it decides to embody its political objectives in that particular shape.

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[16] 1932 S.C.(H.L.) 31, 46; 1932 S.L.T. 317, 324.

[17] Pound, *op. cit.*, p. 104; Jennings, *Law and the Constitution*, App. I.

This theory, even if it has not become orthodox, and from the fallacies inherent in it is unlikely to be swallowed whole or to be found digestible if it is, has exercised an important influence on opinion, and so on the discussion of practical problems. This is perhaps part of the explanation for the limited effect of the recommendations of the Donoughmore Committee (*supra*). The report, however, of the Franks Committee (*supra*) and the consequences which have followed that report, have been a set-back for the supporters of the theory.

"Tribunals are not ordinary Courts, but neither are they appendages of Government Departments," said the Committee in one of the most significant passages of their report.[18] "Much of the official evidence . . . appeared to reflect the view that tribunals should properly be regarded as part of the machinery of administration, for which the Government must retain a close and continuing responsibility. . . . We do not accept this view. We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration." This attitude, as Professor Robson has put it,[19] represents the "reception" of administrative justice into the general system of adjudication. Administrative tribunals are in other words recognised as specialised courts of administrative law. Accordingly, it is off the mark to suggest, as Professor Friedmann does,[20] that the distinction between law and administration is becoming more and more relative as the modern delegation of judicial and quasi-judicial power to administrative organs mingles administrative and judicial functions. The truth is rather the opposite, although before the Franks report this may have been disputable. At any rate since the time of the Donoughmore report the tendency has become more marked to try to prevent the mingling of administrative and judicial functions, and with increasing success. Admittedly some tribunals, *e.g.*, the Transport Tribunal, are concerned with matters of policy as well as law. But so is, for instance, the Restrictive Practices Court, and it would not be any more correct to describe the former as an administrative organ than the latter.

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[18] Para. 40.

[19] [1958] P.L. 17.

[20] *Legal Theory* (4th ed.), p. 404.

If law is to be regarded as an institution, or an instrument, for fulfilling social wants, it must necessarily be endowed with the power to change from day to day in accordance with the perpetual fluctuations of social needs and aspirations. These are not merely manifold and unstable, but also often controversial. It is difficult, to put it mildly, to decide which should be satisfied and which denied, or what priority to give them. The social wants of the working class, it is generally believed, are not easy to reconcile with the social wants of the middle class. On the other hand, if the purpose of law is to establish and protect rights, which in regard to lawyers' law is a more appropriate way of talking, then law can remain something comparatively certain, stable and self-consistent. Legal science is devoted to defining rights as precisely as possible so that there may be the minimum of dubiety and contradiction about them. Of course, there are limits to the possibility of this, and also to the desirability of stereotyping established rights at periods of marked social change. Existing rights are not necessarily completely static; and courts of law are free to develop them as well as bound to preserve them. The creative function of the courts has been abundantly demonstrated by Professor Friedmann and others.

We may agree with those who tell us that social utility and welfare influence, and ought to influence, judicial decisions. Where they seem mistaken is in asserting, or implying, that they not merely influence but determine the result. In fact, they constitute only a part of the determining factors, and perhaps one of the least important, since it is only where the existing rule is doubtful that they enter directly into consideration at all. An analysis of the forces which govern the decision of doubtful cases reveals, according to Cardozo,[21] a fourfold division into (a) logic or analogy, (b) historical evolution, (c) custom, and (d) the *mores* of the day, that is to say current ideas of justice, morals and social welfare. He does not suggest that the fourfold division is anything but approximate, or that any one of the factors involved should invariably take precedence. They are complementary.

In the last forty or fifty years especially the sociological method has been the subject of so much attention that, so far as theory goes, it has obscured the others. It has had a good innings, and perhaps the time has come for it to withdraw from the limelight, if the mixed metaphor may be pardoned. No doubt there is some tendency to forget the value of the historical method. "Justinian's law," Professor T. B. Smith has emphasised, is a mine of practical solutions to contemporary legal problems." [22] Yet it is difficult to see what bearing the social needs and wants of the late Roman empire have on those of twentieth-century Scotland.

We may think, however, that the method which has suffered the most neglect is that of logic or analogy, which Cardozo couples together presumably because analogical reasoning is the typical form of legal logic. " The life of the law," said Mr. Justice Holmes, " has not been logic; it has been experience." [23] He did not say that law is, or should be, illogical. Experience and logic are not enemies or even, though people sometimes speak as if they were, rivals. If Justinian's law is relevant to our problems, that is because our law is founded on Roman law, but also because Roman law has a rational content which is as valuable now as it ever was. In order to be valid at all legal reasoning must be logical. Logic is a science whose use is to enable particular instances to be brought within general rules correctly. Obviously it is to ask too much of it to expect that by itself it can provide a solution to a factual or a legal problem. Logic cannot tell us that all men are mortal, or that Socrates is a man. It only helps in drawing a valid conclusion from facts discovered by experience. Now this is precisely what a judge has to do when he applies a rule of law to the particular circumstances of a case, and though he may do so correctly without any conscious process of logical reasoning, it is surely apparent that the better his logic the more likely he is to reach a sound conclusion.

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[21] *The Nature of the Judicial Process*, pp. 30 *et seq.*; *The Growth of Law*, pp. 61 *et seq.*

[22] " Strange Gods: The Crisis of Scots Law as a Civilian System," 1959 J.R. 119.

[23] *The Common Law*, p. 1.

A consideration of the logical or rational element in the judicial process naturally leads to emphasis on general rules or principles, rather than on the exceptions to which every general rule is subject. On the other hand, if we adopt the historical or sociological approach, we tend to distrust general principles as vague abstractions, either positively misleading or anyway useless for the solving of particular problems, because of the infinite number of qualifications which they admit when they are applied to particular circumstances. Corresponding to these different approaches there are two ways of looking at some modern legal phenomena. On one view, new rules must be invented, without regard to old-established principles, to deal with these phenomena. On the other view, the question is one of redefining and amplifying established principles in such a way as to cover new situations. "One of the foundations of natural law was from antiquity found in the universal and unchangeable obligation to perform a promise. But humanitarian ideas of the full individual, social and economic life and psychological juristic ideas of frustration have been creating all over the world a doctrine of what a French jurist significantly calls 'the right not to pay debts.' The attempt to solve all legal liabilities for loss and injury by a doctrine that liability was necessarily and solely a corollary of fault, put as a fundamental proposition in the Code Napoléon, has failed everywhere."[24] That is one possible view, but must it be accepted as the only one, or the soundest?

It is true that, if "fault" means, as lawyers are inclined to assume, either intentional wrongdoing or else negligence, it is an inadequate foundation in modern circumstances for the liability to make reparation. But must the meaning of the word "fault" be restricted in this way? Life would be very simple if, in order to escape blame, we needed only to refrain from doing harm to others deliberately or carelessly. Suppose a person chooses to keep a cobra in his back garden, and it escapes, to the misfortune of his neighbours, why should he not be thought to be at fault, even though he took every precaution that the best herpetologists advised to domesticate it?

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[24] Roscoe Pound, "Notional Natural Law and Positive Natural Law" (1952) 68 L.Q.R. 330.

Does strict liability involve the creation of an entirely new rule of law independent of fault, or is it not just a development of the principle that liability depends on fault in order to fit modern conditions, which demand in some respects higher standards of legal responsibility than formerly?

Again, is it really the case that the maxim *pacta sunt servanda* is one to which lawyers need no longer pay regard? There have always been certain exceptions to the principle of sanctity of contract, for example when there is a taint of fraud or illegality, apart from some legislative interference with freedom of contract, by the Truck Acts for instance, which may be thought to infringe the principle. In spite of that, it is indubitably true that the sanctity of contract was respected morally, and strictly enforced legally, during the nineteenth century.[25] Has the principle been weakened by recent developments? The suggestion has been made that, under the doctrine of frustration which is now accepted, or coming to be accepted, where there has been an uncontemplated change of circumstances since the contract was made, a court may find it unreasonable to hold the parties bound and declare the contract void.[26]

This opinion does not seem to be well-founded. The theory of an implied term of the contract is no doubt open to criticism as a basis for the doctrine of frustration. The view now approved by the House of Lords is that the rule of frustration comes into play only if there has been such a change of circumstances that to enforce the contractual obligations would be to compel the parties to do something fundamentally different from what they contracted to do.[27] It is still the case that a man is bound by his promise even though it may seem hard, owing to a change in circumstances, to hold him to it.[28] It would in no way contribute to the principle of sanctity of contract if the law held parties to the performance of obligations fundamentally different, owing to an unforeseen change of circumstances, from those undertaken by them. So, too, it does not affect the principle that a contract vitiated by fraud cannot be enforced.

In general, if a sociological argument may be adopted, the law of contract probably goes too far in assisting the strong and near-dishonest to enforce their legal rights against the weak and scrupulous, rather than errs in paying too small regard to the sanctity of contract. The greatest difficulty probably arises in the case of standard contracts, which are so numerous nowadays, and sometimes calculated to make a " right not to pay debts " attractive to lawyers and laymen alike.

In the January 1961 number of the *Modern Law Review* (a special number devoted to law reform) Mr. C. Grunfeld expresses the opinion that the problem of the imposed standard contract is one of the first magnitude of importance among those that should be referred to the Law Reform Committee. The use of contracts of this kind, which occur in almost every sphere of life, from the supply of electricity to the deposit of luggage in cloakrooms, from insurance contracts of all types to the relationship of local authorities to their employees, is not without considerable benefits. It would indeed be hardly possible to get on without them, on account of the time, effort and expense which they save. But at the same time they seriously limit freedom of contract and sometimes confer an unfair advantage on a contracting party, particularly in the case of exemption clauses providing for a one-sided restriction of liability. These clauses have been regarded by the courts with suspicion and hostility,[29] and various ways of defeating them have been explored. The judicial attitude in both Scotland and England is similar.[30]

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[25] P. S. Atiyah, *Introduction to the Law of Contract*, p. 10.

[26] Sir David Hughes Parry, *The Sanctity of Contracts in English Law*, p. 50; Atiyah, *op. cit.* p. 143.

[27] See *Davis Contractors* v. *Fareham U. D. C.* [1956] A.C. 696; *Tsakiroglou & Co.* v. *Noblee Thorl G.m.b.H.*, *The Times*, March 29, 1961.

[28] A. L. Goodhart, *op. cit.*, p. 107.

This forms an interesting chapter of recent law, which is discussed by Mr. Grunfeld. The simplest method of controlling exemption clauses is by strict interpretation *contra proferentem.*[31] A more novel and subtle method, invented in the last ten years, is by the doctrine of fundamental breach, which prevents a party from relying on a clause of this kind where he is in breach of what has been called "a fundamental term" of the contract or of its "main object and intent."[32] The precise meaning and scope of the doctrine is not yet clear, a fact that Mr. Grunfeld regards without dismay, on the ground that room is left for its development along a number of possible lines.

The employment of the term "fundamental" here as in the doctrine of frustration suggests that courts nowadays are anxious to arrive at the underlying purposes of a contract without being too much hampered by a literal reading of the contractual obligations. It does not necessarily follow that the principle of sanctity of contract is violated by such a method of interpretation any more than the rule that a court is bound to give effect to the intention of the legislature is infringed by the construction of a statute in the light of the objects aimed at. A court is not entitled to make a contract for the parties which they have not thought fit to make for themselves.[33] But to construe the contract in a reasonable way is not tantamount to constructing it for them.[34] It must, however, be admitted that, when a court delves too deeply into the essence of a contract, the distinction between construing it and constructing it is apt to become somewhat fine.

Though the principle of sanctity of contract is not, or at least need not be, violated by the doctrine of fundamental breach, both this and the cognate principle of freedom of contract are clearly affected. But the courts can only go a certain distance in developing a doctrine like this, and if they attempt to go too far they will find themselves in a difficulty. They cannot in many cases, without straining the existing law of contract intolerably, give protection to the party on whom a standard contract is imposed. Legislation alone can solve the problem adequately.

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[29] See *Adler* v. *Dickson* [1955] 1 Q.B. 158, *per* Denning L.J., at p. 180.

[30] *North of Scotland Hydro-Electric Board* v. *D. & R. Taylor*, 1956 S.C. 1; 1955 S.L.T. 373.

[31] *White* v. *John Warwick & Co.* [1953] 1 W.L.R. 1285; *North of Scotland Hydro-Electric Board* v. *D. & R. Taylor*, *supra.*

[32] *Karsales (Harrow), Ltd.* v. *Wallis* [1956] 1 W.L.R. 936, 941; *Sze Hai Tong Bank* v. *Rambler Cycle Co.* [1959] A.C. 576, 587. See A. G. Guest, "Fundamental Breach of Contract" (1961) 77 L.Q.R. 98.

[33] *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (1932) 147 L.T. 503, *per* Lord Wright, at p. 514.

[34] See G. H. L. Fridman, "Construing Without Constructing a Contract" (1960) 76 M.L.R. 521.

It may be maintained that courts, when they try to evolve rules for the construction of standard contracts in favour of the weaker party, are trying to restore real freedom of contract, which can only exist when the parties are on more or less equal terms; and that the principle of sanctity of contract has no real meaning where the obligations are imposed by one party upon the other. The freedom of contract of a person buying a steamship ticket may be illusory, if he has to travel and cannot go by any other means. But it is rather dangerous to argue in this way, because the parties to a contract are seldom on entirely equal terms, and it would be impossible to draw a line and say that on one side of it the parties were "really" free to contract, and and on the other side they were not. In the same way, it would probably not be possible to distinguish satisfactorily between a contract that was imposed and one that was not. Ultimately, it is a matter of immeasurably greater importance that courts should uphold contractual obligations than that individuals should be protected from harsh treatment by devious methods of construing contracts. The basis of the objections that may be made to the sociological theory of law is that it refuses to face this and similar uncomfortable truths, or what lawyers have become accustomed to accept as truths. If they are untrue, then law, as it has been understood for two thousand years, is a myth.

To those who are indifferent to theoretical controversies it may seem a remote and abstract issue whether general principles, such as sanctity of contract or the dependence of liability on fault, hold good or do not. Yet it is abstractions like these that "give direction to legal thinking, that sway the minds of judges, that determine, when the balance wavers, the outcome of the doubtful lawsuit."[35] The influence of theoretical considerations on practical issues may be not less strong when it is implicit. Some of the decisions of the House of Lords in cases involving the rule of common employment before its abolition might serve as an example. Compare *Radcliffe* v. *Ribble Motor Services*[36] and *Neilson* v. *Glasgow Corporation*[37] on the one hand with *Miller* v. *Glasgow Corporation*[38] on the other hand. Equitable or sociological reasons may go far to explain the first two decisions, but they cannot explain the different result reached in the last. Can it be doubted that what weighed heavily there was the feeling that a rule is a rule, and cannot be whittled down indefinitely however good the grounds for getting rid of it, and however artificial or even absurd the distinctions that have to be drawn to keep it alive?

The principle that existing rights must be maintained, until they are abolished or altered by legal means, is, after all and whether we like it or not, the primary rule of law. Or, if it is not, what is?

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[35] B. Cardozo, *The Growth of Law*, p. 25.

[36] [1939] A.C. 215.

[37] 1947 S.C.(H.L.) 64; 1948 S.L.T. 42.

[38] 1947 S.C. (H.L.) 12; 1947 S.L.T. 63.

SUMMARIES

By S. G. Kermack, c.b.e., m.a., ll.b., Advocate, Sheriff-Substitute of Renfrew and Argyll at Oban

American Law

New York University Law Review, November 1960: devoted to a Symposium on the Reform of Real Property Law, introduced by Dean Russell D. Niles of New York University; "Re-enclosure of Urban Land," by Professor Dunham, University of Chicago; "Future Interests," by Professor Browder, University of Michigan; "Landlord and Tenant," by Dean Hiram Lesar, Washington University; "Conveyancing," by Professor John E. Cribbet, University of Illinois; "Constitutional Barriers," by Professor Harry M. Cross, University of Washington: and Mr. R. E. Megarry, q.c., provides a comparative sketch of English law reform.

American Bar Association Journal, December 1960: "Courts, Communications and Canon 35" (broadcasting court proceedings), by Charles L. Lyman, Connecticut Bar.

New York University Law Review, December 1960: 1960 Survey of New York Law, divided into Public Law, Commercial Law, Property Law, Torts and Family Law, Adjective Law.

Oklahoma Law Review, November 1960: "Validity of Stockholder Votes in Adverse Interest," by Dean Earl Sneed, University of Oklahoma; "The Executor-Trustee," by Jay C. Baker.

New York University Law Review, January 1961: Annual Survey of American Law, by the professional staff of the University.

Connecticut Bar Journal, December 1960: "The Court and Family Relations," by Hon. Richard H. Phillips, Retired Judge of the Superior Court, Connecticut.

Commonwealth Law

Law Quarterly Review, October 1960: "Strict Responsibility in the High Court of Australia," by Colin Howard.

British Tax Review, September–October and November–December 1960: "Taxation in India," by E. B. Nortcliffe.

Canadian Bar Review, December 1960: "Introduction to Partnership Law," by J. F. G. Baxter, Osgoode Hill Law School (based on Ontario Statute); "Election to Repudiate a Contract," by D. M. Gordon, q.c., Victoria, B.C.; "Combines and Competition, Canadian Public Policy," by Professor Irving Brechar, McGill University.

Criminal Law Review, December 1960: "Assessors in Criminal Trials in West Africa," by Bertham Macaulay, ll.b.

Criminal Law Review, January 1961: "What Colour is the 'Reasonable Man'?" (Northern Territory of Australia), by Colin Howard, University of Adelaide.

Comparative and Foreign Law

Italian Affairs (Council of Ministers Information Service): The Constitutional Court, Functions and Activities.

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Medico-Legal Journal, 1960, Part 4: United Nations and Crime, The London Congress, August 1960, reported by J. P. Eddy, Q.C.

American Bar Association Journal, November 1960: "Constitutional Rights in Juvenile Court," by Judge Paul W. Alexander, Ohio.

ENGLISH LAW

Modern Law Review, November 1960: "Constructive Malice Revived," by Dr. Glanville Williams; "Genesis of the Floating Charge," by Robert R. Pennington, Law Society's School of Law; "General Practice in Industry," by Graham L. Fricke, University of Tasmania.

Law Quarterly Review, October 1960: "The Queen's Bench Master," by Master A. S. Diamond; "Construing Without Constructing a Contract," by G. H. L. Fridman; "Criminal Evidence Act, 1898, s. 1 (*f*)," by Rupert Cross; "Liability and Compensation," by Sir A. L. Goodhart (The *Polemis* question).

Canadian Bar Review, December 1960: "Mistake of Identity of Party," by R. A. Samek, University of Melbourne.

Modern Law Review, January 1961: A special double number on Law Reform in the area of the Law Revision Committee. Machinery of Law Reform, by Professor E. C. S. Wade, Cambridge; its Mechanics, by Sir Noël Hutton, First Parliamentary Counsel; and Law Reform in the fields of Evidence, Contract, Restitution, Tort, Equity, Conveyancing and in the Registered Land System, by authorities on these subjects.

Law Quarterly Review, January 1961: "The Mischief of Secret Trusts," by Sir Lancelot Elphinstone; "Mutuality of Contract," by G. H. Treitel; "Fundamental Breach of Contract," by A. G. Guest.

FORENSIC SCIENCE

Canadian Bar Journal, October 1960: "Religion, Medicine and Law (Blood Transfusion)," by W. Glen How, Q.C., Toronto.

Connecticut Bar Journal, September 1960: "Perception and Strategy in Divorce Counselling," by Dr. Robert J. Redmount, New Haven, Connecticut.

Medico-Legal Journal, Part 4, 1960: "Bodies in the West London Thames," by Gavin Thurston, H.M. Coroner, and in lighter vein, "The Work of the River Police," by ex-Superintendent Tom Fallon, Metropolitan Police; " Decisions of the Industrial Injuries Commissioner based on Medical Evidence," by Neville D. Vandyk; " Drug Addiction in Egypt: Sociological Aspects," by Professor A. A. Abdel-Nabi and Alia El-Nagdi, M.D., Cairo University.

Medicine, Science and the Law, October 1960. The first number of a new journal from the British Academy of Forensic Science. In addition to the articles mentioned below, it contains Law for the Scientist, January–June 1960 (25 pages) and Abstracts and References (30 pages); " Criminal Law, Criminology and Forensic Science," by Professor Leon Radzinowicz; " Facilities for Post-Mortem Examinations," by H. A. Sissons, Royal Orthopaedic Hospital, London; " Isolated Myocarditis as a Cause of Sudden Obscure Death," by Colin Corby, University of Durham; " Diminished Responsibility (in relation to the psychiatrist and to sentencing policy)," by Dr. Glanville Williams, Cambridge; " Investigation of Skeletal Remains of a Known Population," by F. L. D. Steel, London Hospital Medical College.

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INTERNATIONAL LAW

Oklahoma Law Review, August 1960: " Hague Academy of International Law," by R. R. Paradise.

American Journal of International Law, October 1960: " Second Geneva Conference on the Law of the Sea," by Arthur H. Dean, Chairman of the United States Delegation; " Current Status of the Tate Letter (State Immunity Doctrine)," by Leo M. Drachster, New York Bar; Indonesian Nationalisation Measures before Foreign Courts, by Hans W. Baade, Duke University; " Legal Aspects of the U–2 Incident," by Quincy Wright, University of Virginia; " Judgment of The International Court on the case of the Aerial Incident between Israel and Bulgaria," by Lucius C. Caflish, University of Geneva.

American Bar Association Journal, January 1961: " The Rule of Law in Outer Space," by Professor John C. Cooper, McGill University; Three Articles on the Connally Reservation, by E. Smythe Grambrell, former President of American Bar Association (for repeal), Professor Charles S. Collier, George Washington University (for retention) and Frank B. Ober, Maryland Bar (for retention).

JURISPRUDENCE

Oklahoma Law Review, August 1960: " Natural Law as Corporate Purpose," by Professor J. P. Duncan, University of Oklahoma.

New York University Law Review, January 1961: " The Lawyer as Scientist and Scoundrel: Bacon's Quadricentennial," by Professor Edmond Cahn, New York University.

LEGAL EDUCATION

American Bar Association Journal, October 1960: " National Council on Legal Clinics, Education for Professional Responsibility," by Howard R. Sacks.

The Oxford Lawyer, Michaelmas 1960: Concentrates on Legal Education and contains contributions by Sir Sydney Littlewood, ex-President of the Law Society, Robert Goff, Professor J. A. G. Griffith, University of London, Gershon Ellenbogen, and Michael Zander.

LEGAL HISTORY

Law Quarterly Review, January 1961: "Judge Jeffreys as Chief Justice of Chester," by Professor G. W. Keeton.

PARLIAMENT

Western Political Quarterly, September 1960: "Law of Elections and Business Interest Groups in Britain," by Alfred P. Brainard, University of Washington.

Modern Law Review, November 1960: "Sovereignty of the Imperial Parliament," by Professor Hamish R. Gray, Christchurch, New Zealand.

PUBLIC LAW IN BRITAIN

British Tax Review, September–October 1960: Contracting Out (National Insurance Act, 1959); "Estoppel and Local Valuation Courts," by J. A. Andrews.

Public Law, Winter 1960: "The Flexible Constitution," by Professor J. D. B. Mitchell, University of Edinburgh; "The Council on Tribunals," by H. W. R. Wade, University of Cambridge; "The Birch in the Cupboard," by Professor Herbert Storing, University of Chicago and Peter Self, University of London (Agriculture Act, 1947).

British Tax Review, November–December 1960: "German Compensation Payments and Liability to United Kingdom Income Tax," by C. W. Koenigsberger.

ROMAN LAW

Law Quarterly Review, January 1961: "Writing and *Arra* in Sale under the *Corpus Juris*," by T. H. Tylor.

SOCIAL PHILOSOPHY AND SCIENCE

Western Political Quarterly, September 1960: "Albert Camus: Nature of Political Rebellion," by Terry Hoy, University of Maryland; "Resistance to Tyranny: Treason, Right or Duty?" by Guenter Lewy, Smith College.

Study Centre for Jugoslav Affairs Review, Vol. I, No. 1, whose object is to facilitate research on developments in Jugoslavia: An introduction on political and social problems by the lawyer and writer, Bozidar Vlajic; also articles on Conflicts with Stalin and Khrushchev, Tito's Economic Relations and Workers' Management.

American Bar Association Journal, November 1960: "A Common Purpose for the Free World," by Senator J. William Fulbright, Arkansas.

Western Political Quarterly, December 1960: "The Modern World, the Intellectual and William James," by Horace M. Kallen; "J. S. Mill, Disciple of De Tocqueville," by Terence H. Qualter.

(See also under Conferences.)

UNITED KINGDOM LAW

Criminal Law Review, January 1961: "Prevention of Crime Act, 1953," by Ian Brownlie, University of Nottingham.

Periodicals also received: *Jus* (*Milan*), *Revista Jurídica de la Universidad de Puerto Rico*, *Annuaire Polonais des Affaires Internationales*, *International Review of Criminal Policy*, *Revista del Foro* (*Lima*), *Documentation Juridique Étrangère; The Conveyancing Review*, *La Justícia* (*Mexico*).

RECENT LITERATURE

The Parliament House Book 1960–61. 1960. Edinburgh: W. Green & Son, Ltd. Two volumes. £4 4s. net.

The 136th annual edition of *The Parliament House Book* shows the effect of all statutes which received the Royal Assent up to August 1, 1960.

This year an innovation has been introduced in the presentation of annotations and new material. These now appear on coloured paper at the end of the Division to which they relate, instead of being printed in the text. No difficulty should be experienced in finding the new material, as it is all indexed in the appropriate indices.

The publishers are to be congratulated on maintaining the price of *The Parliament House Book* at its present level despite rising costs and the increasing volume of material which has to be included.

D. W. R. B.

The Union of South Africa: The British Commonwealth—The Development of its Laws and Constitutions. Vol. 5. By H. R. Hahlo and Ellison Kahn. 1960. London: Stevens & Sons, Ltd.; Cape Town: Juta & Company, Ltd. Pp. 814 + 85. £4 10s. net.

The classical period of Scots law owed much to the great Law Schools of the Netherlands. Today the scholarly tradition of Roman-Dutch law is carried on by judges in South Africa and Ceylon and by the law schools of South Africa. Though most countries in modern Europe have codified systems, what are in effect variations of the common law (*jus commune*) of Europe, influenced to some extent by English law, survive uncodified in Scotland and South Africa. There are striking similarities in the development of the legal systems of these two countries, and there can be few questions in the field of private law in particular where a Scottish lawyer could not profitably consult South African solutions as a cross-check on Scottish doctrine. Unfortunately, hitherto such solutions have not been readily accessible. All this has now been changed with the appearance of *The Union of South Africa* in the British Commonwealth Series—the pre-eminent and most valuable contribution yet made to the series.

For scholar and practitioner alike in Scotland the appearance of this book, written by Professors Hahlo and Kahn and their able team of specialist contributors, is a notable event, and in the reviewer's opinion it should be in every law library in Scotland and on the shelves of lawyers' chambers. Within the compass of some 800 pages the whole field of South African law has been outlined, analysed and presented with lucidity and sufficient citation of authority to satisfy the daily needs of the comparative inquirer. References are made, not only to the institutional writers and case law, but also to articles in learned journals which deal with topics of special importance to other Romanistic systems.

The reader nurtured in the Anglo-American tradition will find in the chapters dealing with Constitutional law, Criminal law and Mercantile law (though not sale of goods) much that is familiar: these are the divisions of the modern law of South Africa which have been most strongly influenced by English law. The Civilian will find that the chapters concerned with delict, contract, enrichment and moveable property deal with concepts and doctrines with which he is for the most part familiar—though some English influence is also apparent (as in Scots law) even in these fields. By way of background to the whole work, the historical and formal sources of South African law and its spirit today are most ably surveyed by Professor Hahlo (pp. 1–40). His discussion of precedent, custom, institutional authority and the doctrine of desuetude stimulates many comparative reflections in the mind of a Scots lawyer. The weight accorded to Scottish institutional writers seems rather greater that that accorded to the institutional writers in South Africa—perhaps because they were more numerous (and therefore more likely to disagree *inter se*), and did not always write in the language of the courts. Indeed, the courts seem to treat as of roughly equivalent authority with Roman-Dutch writers those who wrote in France, Italy, Germany or Spain. The emergence of doctrines of judicial precedent in South Africa and in Scotland follows a very similar course—for similar reasons; while there is a striking resemblance between the laws of Scotland and South Africa regarding the limits of the doctrine of desuetude of statute law. Regarding the spirit of South African law, the learned author stresses that this system is today a blend of English and Roman-Dutch law developed by the courts to meet the needs of contemporary society in the Union. He is against codification and also against what he regards as " antiquarianism " in law—implying thereby the ousting of received English solutions by invoking the Roman-Dutch institutional authorities of earlier centuries. In South Africa as in Scotland, English law has not always been introduced on true comparative evaluation in the past, and those who would expel English influence again are not always dispassionate in considering the various aspects. Professor Hahlo is probably more sympathetic to the English element in South African jurisprudence than are the teachers at other law schools in the Union, though he may well reflect the views of most practitioners. The reviewer will not in this context obtrude his own views on " The Common Law Cuckoo."

Constitutional law and the Administration of Justice are skilfully and clearly treated by Professor Ellison Kahn (pp. 51–291) in both the historical and the comparative setting. Of particular value is his analysis of the steps by which the South African Parliament overcame judicial opposition to the sweeping aside of the " entrenched clauses." It is a matter for reflection that in the mid-twentieth century the courts both in South Africa and in Scotland had occasion to consider what was implied by parliamentary sovereignty. Perhaps some South African judges would have been strengthened in their opinions had they realised that, within the United Kingdom itself, judges were prepared to assert that the Mother of Parliaments cannot lawfully legislate beyond the limits set on its constitution in 1707.

Criminal Law is discussed perhaps too succinctly by Professor Burchell of Natal in Chapter 7. The learned author has handled his subject with such obvious mastery that the reviewer could wish that he had been able to treat it more fully. Though English law has strongly influenced South African criminal practice (and has been challenged by scholars of the eminence of Professors J. C. de Wet and Swanepoel), Burchell's chapter is definitely of interest to Scots lawyers. Certain common problems such as *furtum usus* have had to be faced. Suicide is no longer a crime in South Africa, the doctrine of desuetude having operated as in Scotland. The discussion (pp. 301–303) of intoxication and mistake of fact or law as defences is valuable; and specially important (in view of the House of Lords decision in the English case of *D. P. P.* v. *Smith* [1960] 3 W.L.R. 546) is the statement on p. 297, that for the crime of murder " intention is now present only where it is proved that the accused foresaw the consequences of his act. It is not sufficient that, although the accused did not foresee, as a reasonable man he ought to have foreseen those consequences." This view, it is submitted, should be the interpretation of the Scottish criminal courts. The general doctrine of " extenuating circumstances " may be usefully compared with the Scottish doctrine of " diminished responsibility "—though, it will be noted, the South African doctrine is not tied to any continuing state of mental instability. The use of assessors sitting with a judge even in capital crimes has proved a just and effective method of trial: there is much to commend such procedure, especially where the evidence is complex or technical.

Chapter 9 (by Professor Hahlo) which deals with the law of Persons and Family law (excluding Husband and Wife) has much of value for a Scots lawyer and for comparative lawyers generally. While there are many situations where Scots law and South African law coincide and solutions in each assist the other, it will be noted that minority in South African law does not draw the distinction between pupil and minor at the age of puberty. The same author (Chapter 10) deals with the legal relationship of husband and wife. This is a field in which the author is a standard authority (see Hahlo, *The South African Law of Husband and Wife*) and his general comments are of special interest, though there are important differences in detail between the Scottish and South African law, *e.g.*, regarding consent to marriage, grounds of divorce and donations between spouses.

Professor Kahn's section on Contract is a valuable guide to the general principles of contract in South African law, though for the practitioner his account must be supplemented by the authorities to which he refers; and, as he writes in English, he introduces the thought of those who wrote in Nederlands or Afrikaans (languages with which the Scottish or Anglo-American lawyer is not generally familiar). Kahn's reconciliation of the " objective " and " subjective " theories by reference to the " reliance interest " is attractive to those who have to weigh Civilian with English influences; and the learned author is conscious of the damage which can result from incautious judicial acceptance of English concepts in the contract field. Due to the influence of Grotius, Roman-Dutch law has not accepted, as has Scots law, the doctrine of the unilateral enforceable promise (*pollicitatio*) and this rejection has not helped development of a consistent theory of *jus quaesitum tertio*. In fields such as error, " innocent misrepresentation " (so-called), and " undue influence," South African law like that of Scotland has been confused by the impact of English law, and

Professor Kahn is wise in stating both schools of interpretation. Scottish lawyers can find ammunition to argue on either side regarding such matters.

Exposition of the law of Delict was entrusted to Mr. Boberg (Chapter 12) and a reading of his analysis should clarify the minds of Scots lawyers who may have been confused by the current incorrect use in Scottish decisions of terms such as "*actio injuriarum*" and "quasi-delict." South African usage conforms to the practice of the Scottish institutional writers and of the judges of the classical period of Scots law. The scope of Aquilian liability (including the possibility of obtaining damages for wrongful omission or for pecuniary damage caused by non-physical injury) is explored, and though the author himself appears to favour a modified English approach in some contexts, his citations here (as when discussing, *e.g.*, the *animus injuriandi* in defamation) do justice to those who wish to burst the fetters on delictual liability borrowed from the English law of torts.

Professor J. E. Scholten, a scholar of immense erudition and experience, condenses his thought on Unjust Enrichment and Property in two all-too-brief chapters (13 and 14). Both are valuable pointers to the main authorities, and the comment is that of a master in fields where Scots and South African law (except regarding land tenure) substantially coincide.

Succession in South Africa, however, has many specialities which are not shared by the Scottish system, and discussions of *fideicommissa* have importance for the comparatist interested rather in contrast than coincidence. Mercantile law, being largely English in origin, calls for little comment—except that the South African Law of Sale of Goods corresponds very closely to what the law of Scotland was before the unhappy confusion introduced by the Mercantile Law Amendment Act, 1856, and the Sale of Goods Act, 1893. Since these statutory interventions did not altogether abolish the common law of Scotland, consideration of South African law today may assist to identify what the common law was and, perhaps, is. Lastly on the divisions of this book, a special word of commendation is due to Professor Kahn for his learned and lucid summary (Chapter 17) of that very difficult subject "Conflict of Laws." His exposition is characterised by originality of thought and confidence of expression.

Other topics are also handled with skill, but call for no special discussion in this review. A very useful bibliography is included, and comprehensive lists of cases and statutes. The index falls short of perfection, and could with advantage be more detailed. It would be regrettable if the necessary treatment in a work on South African law of topics such as apartheid, the Immorality Acts, corporal punishment or native law deterred readers familiar only with European problems from valuing this book at its true worth. In the field of private law in particular there is no work of comparable scope and quality for those who study or practise in "mixed" Romanistic systems—or who appreciate their value for comparative jurisprudence. Some South African lawyers and some Scottish lawyers may well think that the English elements in South African law have been treated at times with too much favour; others will contend that the "Witwatersrand School" represents accurately what the courts do in fact. It is not for the reviewer *tantas componere lites*: he will assert that both sides are fairly stated so that the inquirer may choose between them.

This volume is a major achievement in itself, and should lead to ever-increased interest in South African law. Professors Hahlo and Kahn and their learned team of contributors have rendered great service, not only to their country, but also to lawyers in many lands —in Ceylon and Scotland above all.

T. B. SMITH.

The Machinery of Justice in England. By R. M. Jackson, LL.D., Reader in Public Administration in the University of Cambridge. Third Edition. 1960. London: Cambridge University Press. 45s. net.

By its two previous editions this book has already won a secure place as an introductory textbook of high quality for students entering on the study of law and as a survey of authority, for laymen and others outside English law, notable for its vigorous presentation. This new edition takes account of all developments down to the beginning of 1960.

Dr. Jackson starts from the premiss that the essential preliminary background to the study of the principles of the various branches of the substantive law is an understanding of the machinery, the institutions, persons and agencies which apply those rules to problems, sets of facts and actual controversies. There are therefore chapters on the courts of civil jurisdiction and of criminal jurisdiction, the personnel of the law, and the cost of the law, all written with the lucidity of the experienced lecturer and the discerning and critical approach of a writer who has intimate knowledge of what he is discussing, who does not conceal his own views and who is concerned that the legal system should serve the community as efficiently and cheaply as possible. He is thoroughly dissatisfied with the law's delays and the disappointing results (or lack of results) of the Evershed Committee's examination of Supreme Court Practice and Procedure, the delay in introducing fixed dates for trials, the continued excessive insistence on oral evidence, the unsatisfactory provision for legal aid in criminal cases (though this may have been in part cured by now), the unhappy position of the unaided defendant in a summary case in a magistrates' court, and so on. This is very right and proper; lawyers are too often, and are even more often accused of being, complacent about the perfection of the existing system. Particularly important in the chapter on the criminal courts are the sections on sentencing, probation and punishment. Criminals cannot be dismissed from consideration when they have been found guilty and sentenced, as is too often done in books on criminal law.

The latter parts of the book are substantially new. Chapter 6 deals with special tribunals. Dr. Jackson objects to the common term " administrative tribunals," pointing out that these bodies have nothing to do with administration though, apart from the fact that that term has become common and probably normal, it is not wholly unreasonable to call them " administrative," in that most of them deal with disputes which have arisen incidentally in the course of the administration of Government policy, rather than out of disputes between individuals. He discusses various specimens of tribunals. This tends almost inevitably to be disjointed, for it is practically impossible to group or classify the main existing special courts and tribunals in any completely satisfactory way; but it is very important and would be quite anachronistic to let the reader think that all, or most, legal controversies are decided in the ordinary civil or criminal courts after trial. " Planning appeals alone have been running at over 6,000 a year. . . . The number of contested cases is over six times that of the ordinary actions heard in the Queen's Bench Division."

Chapter 7 deals with the outlook for reform and discusses the work of the Law Reform Committee, the Statute Law Committee and the Committee on Private International Law; with the consolidation of enactments, and the oft-repeated proposal for a Ministry of Justice. Dr. Jackson is now of the view that such a ministry is not a matter of such great importance and that law reform can proceed perfectly well under the existing arrangements if only Parliament is prepared to find time for the necessary Bills.

Not the least of the merits of Dr. Jackson's book is his willingness to criticise what is bad in the English system (and the substance of his criticisms applies in large measure in Scotland too), and his criticism, sometimes trenchant, always well-informed, frequently illustrated by incidents from his own wide practical experience, is valuable, springing as it does from an obviously sincere concern that law should be made a better and more effective piece of social machinery.

Interesting and of value are his comments on current controversies; on the deficiency in the practical training given to young barristers and the deficiencies in the University law schools; on the fusion of the two branches of the profession (on which his conclusions are that if they were amalgamated " it is probable that there would be a slight reduction in cost. I doubt if the saving would be as drastic as some people think. Specialisation would still be needed . . . The public gain from amalgamation is so problematical that compulsion by legislation could hardly be justified "); on the earnings of barristers; on juries (" The current opinion is perhaps on these lines: jury trial in civil cases is sometimes satisfactory and sometimes most unsatisfactory, and hence the restriction of jury trial has been a wise development; however, there is much to be said for jury trial in criminal cases and (in the past at least) in cases where the liberty of the subject is concerned "); on costs and legal aid.

There are a few slips of which the only material one is that in the table on page 9 the bracket entitled " after 1881 Q.B.D." should enclose Exch.D. as well as Q.B.D. and C.P.D., while at pp. 306–307 it is not wholly clear that the Industrial Disputes Tribunal, created in 1951, superseded the National Arbitration Tribunal (1940–51) and itself lapsed in 1959. The book is authoritative, informative and lucid, and at the same time stimulating, critical and appreciative of the defects as well as the great merits of the present system. This edition will worthily maintain the book's reputation and it deserves wide attention outside as well as inside England.

David M. Walker.

Introduction to Jurisprudence. By Dennis Lloyd. 1959. London: Stevens & Sons, Ltd. 45s. net.

Jeremy Bentham, particularly through his influence on analytical jurisprudence, has for long dominated legal philosophy in England. This has been of advantage to jurisprudence in that it has given its study a sense of continuity, whereas on the Continent, once the philosophical systems of the nineteenth century had been abandoned, the field became a battleground of different schools and tendencies. English thinkers, in defence of the continuity of their tradition, have preferred to pay but limited attention to the other European influences; Laski's judgment on "The Pure Theory of Law," that it was "an exercise in logic and not in life," was the expression of a widespread conviction. Modern positivist and nominalist movements have been built on the foundation of the Benthamite-Austinian jurisprudence, and it is to them that Professsor Lloyd proclaims his allegiance: "I am not ashamed to affirm that my own allegiance is with the positivists" (p. xiii).

Lloyd's book—though it remains faithful to this position throughout —shows much interest in other forms of legal philosophy, and it is noteworthy that this widening of horizons is the result of a change in teaching methods. Using the pragmatic approach of the American "Reader" as a model, Lloyd offers us a large number of extracts divided into chapters: *Natural Law, Sovereignty and The Imperative Theory, Sociological School, American Realism, Marxist Theory of Law, Scandinavian Realists, Pure Theory of Law, Custom and the Historical School, The Judicial Process.* But his book differs from the American manuals in that the selection of material is dictated by the author's personal standpoint, which declares itself in the various introductions and comments with which each chapter is furnished. As a result, the book has an importance beyond that of a mere teaching manual.

Lloyd approaches his work from the standpoint of the lawyer: "I am a lawyer," he says (p. xv), "and not a philosopher." It is precisely this fact which allows him to take over from the nominalist and positivist movements only what is compatible with the structure of the law. Thus he rejects such extreme positions as the reduction of all legal problems to problems of linguistic analysis, or the rigid isolation of legal science from other disciplines. His philosophical preparation was influenced by the teaching of Wittgenstein, whose work was designed to demonstrate the linguistic nature of philosophical problems. Lloyd attended his lectures at Cambridge in the thirties and recognised the importance and value of his "purgative" approach in the field of law. Certainly the analytical movement was sympathetic to the proposition that "what is of first importance is to avoid confusions or misunderstandings which have their roots in the misuse of language."

Lloyd's attitude to Hans Kelsen's "Pure Theory of Law" is cautious. He considers the problem of the basic norm "a very troublesome feature of Kelsen's system." The reduction of the legal system to unity cannot go beyond certain limits; a constitution may contain irreconcilable contradictions and nonetheless continue to function as a legal system. While we agree with this criticism, we would suggest that to a strict Benthamite a pluralistic conception of the legal system should appear tainted by a natural law tinge. In fact Lloyd is a follower of Bentham only in so far as his doctrines can be applied in "our modern atomic age" (p. xiii). The return to Bentham's original thought serves to show how un-Benthamite is the notion of a legal science isolated from other disciplines, and thus fully justifies the author's ample treatment of the sociological and Marxist movements.

Lloyd has reached these methodological attitudes through an inquiry into the peculiar nature of legal logic and judicial reasoning. The material collected in the chapter on the Judicial Process (pp. 386–472) is particularly interesting to a Continental lawyer. While he rejects the illusion of a Mechanical Jurisprudence, he does not share the relativist conclusions of those who regard the judge's decision as an arbitrary choice dictated by emotions. "Such a choice is not logical in the sense of being deductively inferred from given premises, but it has a kind of logic of its own, being based on rational considerations which differentiate it sharply from mere arbitrary assertion" (p. 399). The judge's choice is based "upon cumulative reasons," and standards relating to the truth and falsity of propositions are inapplicable. In this connection the author might usefully have made some reference to the techniques of argumentation which Toulmin has described in his recent "Uses of Argument."

In conclusion we may say that this book quite transcends the traditional methods of jurisprudence and allows a balanced judgment to be made of the positivist and nominalist movements. On the one hand there is full awareness of the limits of linguistic analysis in the field of law, and on the other hand there is a searching towards a logic which will take account of the actual processes of judicial reasoning.

ALESSANDRO GIULIANI.

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(*A later review is not precluded, especially where books are received shortly before going to press.*)

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JURIDICAL REVIEW

JUS QUAESITUM TERTIO: THE TRUE MEANING OF STAIR I.x.5

"THE House of Lords in the case of *Carmichael's Executrix* v. *Carmichael*, 1920 S.C.(H.L.) 195 [1920, 2 S.L.T. 285], provides a disingenuous gloss on this passage from Stair. Its decision by laying down that Stair meant what he is careful not to say would have warmed the hearts of the pontifical lawyers." It is the contention of this article that Professor Muirhead's comment on *Carmichael's* case is correct, and that the House of Lords there interpreted Stair's remarks on the subject of *jus quaesitum tertio* in a sense which would have occasioned no little surprise in their author.

Stair's famous passage is as follows: "It is likewise the opinion of Molina and it quadrates with our customs that when parties contract if there be any article in favour of a third party at any time, *est jus quaesitum tertio* which cannot be recalled by either or both of the contractors, but he may compel either of them to exhibit the contract and thereupon the obliged may be compelled to perform. So a promise though gratuitous made in favour of a third party, that party albeit not present or accepting, was found to have right thereby." The House of Lords, deliberately ignoring what Lord Dunedin called "the natural or grammatical sense" of the dictum, reached the conclusion that "irrevocability is a condition and not a consequence" of the creation of a *jus quaesitum tertio*. It was laid down by *Carmichael's* case that delivery of the contract to the third party, or some equivalent circumstance showing an intention to make a donation to him, was necessary in order to make the contract "irrevocable"; and that such "irrevocability" was necessary before a third party could enforce a provision made in his favour.

In support of his view Stair cited four Scots authorities, and a passage from Molina, a Spanish Civilian writer of the sixteenth century. One of the features of the judgments in *Carmichael's* case is that, while the Scots authorities quoted by Stair and also those subsequent to him are exhaustively discussed, no reference whatever is made to Molina's writings. This omission is a major cause of the misinterpretation of Stair's dictum which, it is submitted, was made in that case. The problem of the rights of a third party arising from a contract in his favour is not peculiar to Scots law and, in particular, it gave rise to much discussion among the Civilian writers who preceded Stair. The Roman law had no general doctrine of *jus quaesitum tertio*. "Alteri stipulari nemo potest" (D.45.1.38.17) was the rule, and it was a rule which applied to all types of contract, not only to the formal stipulation. There were however qualifications to this rule: a son *in potestate* or a slave could acquire rights for the *paterfamilias*, and a *negotiorum gestor* for his "principal." The owner of goods which had been deposited by another person on an agreement with the depositary that the goods should be returned to the owner could sue the depositary by *actio utilis* on the agreement in his favour—a more convenient remedy than the *vindicatio* which was his alternative (D.2.14.2:13.5.14.3). A similar *actio utilis* was allowed to a pledgor where the pledgee had sold the pledge on an agreement that if the debt was paid the pledge would be returned to the pledgor (D.13.7.13 pr.). These qualifications of the rule gave rise to much argument among the Civilians, and a number of explanations of them were suggested. Bartolus assimilated the third party's right to that of the beneficiary of a *fidei commissum* and held that in general where an undertaking in favour of a third party was given with reference to a thing and to the owner of the thing, and the thing in question remained the property of the person to whom the undertaking was given, then the third party acquired a right: if the thing in question did not remain the property of the person to whom the undertaking was given the third party acquired no right. " Quandoque paciscor super re mea quae durat mea et alteri quaeritur utilis; quandoque stipulor super re quae est mea tamen non durat mea, et tunc alteri non quaeritur actio regulariter "[1] (Comm. ad. D.45.1.38.20, quoting D.16.3.26 pr.). On the other hand, Paulus de Castro (Comm. ad. D.12.4.5) and later Alciatus (Comm. ad. D.45.1.122.2) assimilated the third party's right to that of the creditor in an innominate contract, and held that acceptance of the proposed benefit by the third party was necessary to give him an enforceable and irrevocable right.[2] It was from this source that the Roman-Dutch doctrine of third-party contracts was developed by Grotius, Groenewegen and Voet, whence it passed into South African law.[3]

Neither of these views on the rights of a third party influenced Scots law; the passage from Molina which Stair cites is not a general discussion of the position of third parties in the law of contract, but a discussion of a particular and special case in which the Roman law allowed a right to a third party. C.8.54.3 provides: " Quotiens donatio ita conficitur ut post tempus id quod donatum est alii restituatur, veteris iuris auctoritate rescriptum est, si is in quem liberalitatis compendium conferebatur stipulatus non sit, placiti fide non impleta ei qui liberalitatis auctor fuit vel heredibus eius condicticiae actionis persecutionem competere. Sed cum postea benigna iuris interpretatione divi principes ei qui stipulatus non sit utilem actionem iuxta donatoris voluntatem competere admiserint, actio quae sorori tuae si in rebus humanis ageret competebat tibi accomodabitur." [4] This, the so-called *donatio sub modo*, is clearly an exceptional case, and it was accepted as such and admitted by most Civilian writers as a case where the third party acquired a right from an agreement between two others. The Roman rule stood unmodified until the time of Bartolus: but Bartolus required to consider a new problem. "Quidam donavit alicui unum fundum ut post tempus esset cuiusdam ecclesiae: iste donator vult istud pactum remittere, quaeritur an possit. Videtur quod non quia ecclesiae iam est quaesita actio utilis (C.8.54.3). Tu dic contra, sicut acquaeritur ius servo et tamen ista pactio potest tolli voluntate donatoris solius vel utriusque (D.18.7.3), heres autem non posset mutare voluntatem ut ibi" [5] (Comm. ad. D.45.1.122.2). Bartolus thus held that the third party's right was contingent on the continuance of the donor's intention to benefit him, and that the donor could revoke the condition in favour of the third party. This decision is based on an analogy between the position of the third party and that of a slave who has been given away under the condition that he is to become free after a certain time: and as the donor could revoke the condition conferring freedom on a slave, so Bartolus held, he could revoke the condition in favour of a third party. Bartolus' decision however accords with his general view of the nature of a third party's right on any agreement in his favour. That right for him depends not on the consent of the donee, but on the will of the donor or owner of property, on the continuance of the donor's intention to benefit the third party. Thus the third party's right may be compared to that of the beneficiary of a *fideicommissum*. It is not a contractual right proper since it depends on the will of the donor, not the consent of the first donee. Alternatively, the situation might be compared to that arising in the case of mandate: the original donor directs payment to the third party, but the direction is revocable. Bartolus however did hold that the provision to the third party became irrevocable on the death of the donor.

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[1] " Sometimes I make a contract [*Sc.* in favour of a third party] concerning a thing which is mine and remains mine, and then the third party acquires an action: sometimes I make a contract concerning a thing which is mine but does not remain mine, and then, in the ordinary case, the third party does not acquire an action."

[2] Alciatus in the passage cited appears to incline to the view that it is the promisor who makes an offer which the third party can accept. However the promisee, if he actually receives the promise on the third party's behalf, is sometimes treated as a *negotiorum gestor*, and the third party is held entitled to ratify the contract. There is a tendency to treat acceptance and ratification by the third party on the same basis. South African law seems to have accepted the view that it is the promisee who makes the offer to the third party. See Wessel's *Law of Contract in South Africa*, 2nd ed., vol. 1, pp. 510 *et seq.*, and *Crookes* v. *Watson*, 1955 (1) S.A. 277.

[3] See *Crookes* v. *Watson*, *supra*, for a survey of South African law on the subject, and compare Hahlo & Kahn, *The Union of South Africa* (British Commonwealth Series), pp. 487–488.

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[4] "It has been decided, on ancient authority, that whenever a donation is made on the condition that the thing donated is, after a certain time, to be transferred to a third person, but the third person is not a party to the contract, if the contract is not kept then the author of the gift or his heirs may sue to recover it. But since the divine emperors have subsequently given a favourable interpretation of the law, and allowed the third person who was not a party to the contract an action, according to the donor's intention, the action which your sister could have raised if she had been alive will be allowed to you."

[5] "One man gave a farm to another on the condition that after a time the farm should belong to a certain church: the donor wishes to remit that condition: the question is whether he can do so. It seems that he cannot, because the church has already acquired an action (C.8.54.3). But you should follow the opposite view, namely that, just as the right acquired by a slave from a pact between donor and donee can be taken away by the will of the donor alone or of donor and donee together (D.18.7.3), so also in this case: but in this case the heir cannot remit the condition, as he can in the case of the slave."

Bartolus' view became the common opinion among later Civilians.[6] In subsequent discussions however a further question was raised. Granted that the donor could revoke the condition in favour of a third party up to the time at which the thing in question was due in terms of the agreement to be transferred to the third party, could the donor revoke the condition and defeat the third party's right after that time had arrived? It was agreed among Bartolus' successors that acceptance or ratification by the third party, or actual transfer of the thing to him, made the provision to him irrevocable. The common opinion also was that when the time for transfer of the thing arrived, the contract became irrevocable. The ground of this opinion is stated by Covarruvias: " ea ratione, quod nullus locus sit poenitentiae postquam ius est tertio quaesitum." [7] Covarruvias himself went on to inquire " quando ius dicatur tertio absenti quaesitum,"[8] and concluded that the *tertius* acquired no right until acceptance by or transfer of the thing to him.

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[6] It may be noted that canon law originally recognised the validity of a *stipulatio alteri*—see Sextus 1.18.c2 and Hostiensis *Summa Aurea* Lib.I. De Pactis Rubr. 1 and 6. Baldus, Antonius and Bartolus all accepted that a stipulation in favour of a third party was valid *jure canonico*. Later canonists however hesitated over this divergence from the civil law. Panormitanus held that the *stipulatio alteri* was invalid at both civil and canon law (see Gloss. ad. " et per te." Decr. Grat. causa 1. q. 7, c. 9), and by the end of the fifteenth century canon law on the point was no clearer than civil.

[7] " For this reason that there is no room for a change of mind after the third party has acquired a right."

Molina preferred to follow the common opinion, and rejected the authority of Covarruvias. He pointed out that, when the time for transfer of the thing to the *tertius* arrived, the *tertius* could sue for it, even although he had not stipulated for it from the donor, nor accepted the gift; moreover, no assignation was necessary to give him the right to sue. Acceptance by the *tertius* made the condition in his favour irrevocable. Molina continues "Quando res non esset integra quia gravamen solutum esset tertio absenti, conveniunt communiter doctores non posse revocari . . . Iulius Clarus . . . vult adveniente tempore constituto ut solveretur gravamen, esto neque traditum neque acceptum esset a tertio cui est solvendum, non posse iam per donatorem revocari, et idem affirmant multi. . . . Ducuntur quoniam ab eo temporis momento est iam ius perfecte quaesitum illi tertio. . . . Quoniam C.8.54.3, non prius donatori et tertio tribuit actionem adversus donatarium ad gravamen exigendum quam adveniat tempus restitutionis, donatarius promissum non servet: quare cum ab eo puncto tertio illi ea actio iam competat, censetur habere ius perfectum ex dispositione C.8.54.3 ut sit sibi omnino et perfecte debitum ita ut donatarius in culpa sit si illud ei non tradat, revocare illud non potest donator"[9] (*Disputatio* 265 § 12). Thus Molina held that on the arrival of the term for payment to the third party, the third party acquired a right which he could enforce by action and which the donor could not defeat. This result was held to follow from the fact that when payment was due the third party was allowed an action, following C.8.54.3.

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[8] "When the absent third party may be said to have acquired a right."

[9] "When matters are not entire because the condition in favour of the third party has been fulfilled, the doctors are agreed that revocation is impossible. . . . Iulius Clarus . . . holds that when the time fixed for performance of the condition in the third party's favour arrives, even though the thing has not been delivered to nor accepted by the third party to whom it is to be transferred, the donor cannot then revoke the condition: and many authorities agree with him. . . . They are led to this view by the consideration that from that moment the third party has already completely acquired a right. . . . Since C.8.54.3 did not allow the donor and the third party an action against the donee to enforce performance of the condition until the time for performance of the condition arrived and the donee failed to keep his promise: and since from that time the third party does have an action and is considered to have a complete right under the provisions of C.8.54.3, with the result that performance of the condition is perfectly and completely owing to him and the donee is at fault if he fails to transfer the thing to the third party, therefore the donor cannot revoke the condition in favour of the third party."

Molina was discussing cases of a limited class; but his doctrine that, in cases of that class, the third party could sue for performance of the obligation to him without assignation, without acceptance, on the sole condition that performance was due, and that the donor could not then revoke the provision, is clearly not without significance for the understanding of Stair's dictum. By parity of reasoning, if performance is due at once, the provision to the third party is at once irrevocable. This however is not the only point to emerge from a study of the Civilian authorities. Scots law has adopted the term "*jus quaesitum tertio.*" Bartolus' phrase is "sicut acquaeritur ius servo": Paulus says "tunc acquisitum est ecclesiae ius perfectum." Jason distinguished between a "jus quaesitum" and one which "venit quaerendum post tempus," holding the former to be immediately irrevocable. When the Civilians say "jus quaeritur" or "jus acquisitum est tertio," they mean that the third party has acquired a right; and for most of them, and especially for Molina, when the third party had acquired a right, that right was irrevocable. Thus when Stair used the expression "est jus quaesitum tertio" he was not merely lapsing into Latin: he was using a phrase with a background and a technical significance, which would suggest to a reader familiar with Civilian writings the irrevocable vesting of a right in the third party. Further, it is important that the phrase "est jus quaesitum tertio" be accurately translated. "Quaesitum" is not an adjective; "quaesitum est" is a verb, and the phrase means "The third party has acquired a right." That being so, it is extremely hard to see how Stair could have intended his dictum to bear any other sense than the natural and grammatical one, which is also the sense supported by Molina's doctrine.

The House of Lords rejected the natural sense of the dictum for two reasons: first, that it was not supported by the Scots authorities quoted by Stair, and second that it was inconsistent with later authority. Lord Dunedin argued that the four cases which Stair cites showed that delivery of the contract to the third party or some equivalent circumstance was necessary to create a *jus quaesitum*. The first case which Stair cites is *Nimmo* (1627) Mor. 7740. There the buyer of goods agreed to pay the price to certain creditors of the seller. The creditors craved inhibition on the clause in their favour. It was doubted whether they might, since " neither were the parties contractors therein, nor, in the inhibition craved by any of the contractors." Nevertheless the supplication was allowed. Lord Dunedin remarks of the case that the seller of the goods concurred in the application, but the report in Morison does not bear out this view. In *Renton* v. *Aiton* (1634) Mor. 7721, the second case cited, a third party was allowed to found on a clause in her favour on the express ground that the contract, being registered, was as good as delivered to her. *Ogilvie and Grant* v. *Ker* (1664) Mor. 7740, held that where lands were sold and the purchaser taken bound to pay the price to a creditor of the seller, seller and purchaser together could not revoke the clause in the third party's favour, since the bargain took effect. In this case, the seller did concur in the third party's action. In *Irvine* v. *Forbes* (1676) Mor. 7722 a clause in a third party's favour was allowed effect, apparently on the ground that the writ was presumed delivered.

It is true that in *Ogilvie and Grant* v. *Ker* the seller of the lands concurred in the third party's action. It is difficult to see what the significance of his concurrence was, since the whole question turned on the validity of a discharge granted by the seller to the purchaser: that is, on the validity of a purported revocation of the provision to the third party. The court held that since the bargain took effect revocation was precluded and there was no reference to delivery of the contract to the *tertius* or any equivalent circumstance. So far as can be seen, the fact of the seller's concurrence played no part in the decision of the case. It is also true that in *Renton* v. *Aiton* and *Irvine* v. *Forbes* the question of delivery of the contract was of great importance. But the importance of delivery in those cases can be explained otherwise than by saying that delivery to the third party is essential to the creation of a *jus quaesitum*. Here Bankton's remarks on the question are of great importance. Bankton says (I. xi. 7) " If the contract become void, by supervening accident, betwixt the parties contractors, the third party's interest that depended on it ceases: but otherwise when it is once perfected and the writing out of the grantor's hands there is a right acquired to the third party conform to the provision therein: which can only be taken away by his own consent, nor will the oath of the contractors render ineffectual his interest, or any deed done by them." Bankton, who cites the same Scottish authorities as Stair, with the exception of *Nimmo*, thus places the emphasis on delivery of the writ as perfecting a written contract. We may compare Mackenzie's dictum: " By our law an Obligation in Writ is not binding, except it either be delivered or dispense with the not delivery, by a special clause therein, nam traditione transferuntur rerum dominia: but tradition is not requisite in mutual contracts, or where the grantor has an interest to keep the paper himself, as where his liferent or liberty to alter is reserved " (Institutes III.2.6).[10] It is submitted that, according to Bankton, delivery is not a necessary step to give to a third party a right arising from a contract already completed between two others. Delivery is a necessary step in order to complete the contract at all. Here a general rule of the law of contract is in operation, namely, that delivery is necessary to complete an obligation in writing subject to the exceptions mentioned by Mackenzie. It is not a special rule relating to contracts in favour of a third party. Delivery is vital not as showing an intention to donate to the third party, but as showing an intention to be bound.

Thus the cases of *Renton* and *Irvine* do not conflict with the wider sense of Stair's dictum, namely that when a contract is formed between two parties a third party in whose favour a clause is conceived gets an immediate right. It is worth noticing also at this point that Stair says that the third party may compel either of the contractors to exhibit the contract—a remark which tends to suggest that delivery to the third party was not in his view essential if he were to enforce his right. Accordingly, we find in the authorities which Stair quotes the following propositions: in Molina, that where a gift has been made and it has been made a condition that the thing given should be transferred to a third party, the obligation in favour of the third party is irrevocable from the time when it falls due and becomes exigible; in the Scots cases, that in a wide class of cases a third party acquires a right from a contract in his favour when the contract is complete, and that the parties to the contract cannot defeat the third party's right. It is submitted that these propositions together form a doctrine which matches exactly with the wider sense of Stair's dictum; and that the authorities, the historical background, and Stair's use of the phrase " est jus quaesitum tertio," combine to prove that Stair meant exactly what he said.[11]

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[10] Compare Erskine III.7.43; Bell, *Principles*, § 23; Dickson, *Evidence*, I. § 916; Gloag, *Contract*, 2nd ed., pp. 66–67.

It remains, however, to consider the second branch of the argument in *Carmichael's* case, namely the argument that the wider sense of Stair I.x.5 is inconsistent with later authorities from *Hill* v. *Hill* (1755) Mor. 11580, onwards. *Hill's* case concerned a bond which a father in lending his own money took in his son's name. The son died, and his executor and the father competed for the sum in the bond. The executor maintained that delivery of the bond by the grantor of it to the father was delivery for the son's behoof, and that the son therefore acquired a *jus quaesitum*. The father maintained that, the money lent being his, and the bond being a provision for his son, it was to be presumed, according to settled principles, that the father meant to retain it under his own control during his life, and therefore that it was revocable in the father's life unless delivered to the son. The father's defence was upheld. Lord Dunedin argued that the wider interpretation of Stair I.x.5 was also inconsistent with the modern cases concerning donation of deposit receipts, such as *Jamieson* v. *McLeod* (1880) 7 R. 1131, *Crosbie's Trs.* v. *Wright* (1880) 7 R. 823, with the cases of *Hadden* v. *Bryden* (1899) 1 F. 710, and *Jarvie's Tr.* v. *Jarvie's Trs.* (1887) 14 R. 411, and *Balvaird* v. *Latimer*, 5th Dec., 1816, F.C. In *Balvaird*, the buyer of heritage took the title in another's name, but no infeftment followed: the buyer was held entitled to revoke the destination. *Jamieson* v. *McLeod* concerned a deposit receipt taken by a husband in name of himself, his wife and the survivor. The receipt was one of a series which extended over a period of ten years: all the receipts in the series were in the same terms and the amount diminished over the period. Accordingly it was plain that the husband had used the money for his own purposes. There was no extrinsic evidence of donation, and it was held that the terms of the receipt were not enough to establish donation to the wife either *inter vivos* or *mortis causa.* Similarly, in the well-known case of *Crosbie's Trs.* v. *Wright* the terms of a deposit receipt were held insufficient by themselves to establish donation *mortis causa,* but donation was held to be established by other circumstances. In *Jarvie's Trs.* a policy of insurance was taken by a husband in favour of trustees for behoof of his wife and children: the husband kept the policy and the trust remained latent, unknown either to the trustees or the beneficiaries: it was held that without delivery, actual or constructive, of the policy, the beneficiaries had no vested right. *Hadden* v. *Bryden* concerned a policy of insurance made by a boy of eighteen on his own life. The policy passed at once into the possession of the boy's father, who kept it and paid the premiums until his death. In his will the father referred to the policy as his own property. It was held that an act of donation was necessary to pass the property in the policy from the father to the son. Lord Dunedin also argued that the case of *Stonehewer* v. *Inglis* (1697) Mor. 7724, supported the narrower interpretation of Stair. There a debtor sent a sum of money to a party signifying that it was to be paid to a certain creditor: before a written order arrived, another creditor arrested. The arrestor was preferred on the ground that the order might have been countermanded and the money remained the debtor's property until delivery for " traditionibus non nudis pactis transferuntur rerum dominia." To these cases may be added *Walker's Ex.* v. *Walker* (1878) 5 R. 965, where a husband in lending his own money took an assignation of a security in name of himself, his wife and the survivor. The husband kept the security and it was held that, the deed being undelivered, the funds fell into his executry estate, on the ground that he had kept them under his control during his life.

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[11] Note also that a right in a third party was recognised in *Wood* v. *Moncur* (1591) Mor. 7719; *Cockburn* v. *Congleton* (1685) Mor. 7780 (Brown's Synopsis, Feb. 1687), and two cases recorded in Hope's *Major Praktiks*, II. 1. 30 (1616) and II. 3. 37 (1612).

From these cases it would appear that the terms of an obligation are not necessarily enough to determine who is the true creditor. It is well however to recall at this point the distinction drawn by Lord Dunedin himself in *Carmichael's* case. " The one sense [of *jus quaesitum tertio*] is meant when the question being considered is simply whether the *tertius* C has the right to sue A in respect of a contract made between A and B to which contract C is no party. . . . The other sense of the expression is when the emphasis is, so to speak, on the *quaesitum*, and when the controversy arises not between C and A but between C and B. In such a case A is willing to perform his contract, and the contract in form provides that A shall do something for C, but B, or those who represent B's estate, interfere and say that B and not C is the true creditor in the stipulation ": (1920 S.C.(H.L.) at 197–198; 1920, 2 S.L.T. at 286–287; *cf. Dickson* v. *National Bank of Scotland*, 1917 S.C.(H.L.) 50; 1917, 1 S.L.T. 318). The cases on which Lord Dunedin relied, as well as *Carmichael's* case itself, fall into the second of these two categories: but they have also another common feature. In each case, with the exception of *Stonehewer* v. *Inglis*, the debtor's obligation is something which B has acquired by laying out his own money. B receives in exchange for money an obligation which is in form directed to a third party. Now if the third party were to sue A, A could not refuse to pay him: he could not refuse to perform the contract according to the terms which he has undertaken; yet the mere form of the obligation is little more than an undertaking to repay (an insurance policy being treated just as a bond for payment of money, for these purposes). It appears that the court in such circumstances looks to the substance of the original transaction, not to the form of undertaking given by the debtor. The form of undertaking, after all, is dictated by the person who acquires it. We may compare the remarks added to the report of *Hill's* case, where it is stated " Hence it is that when a man lends a sum and takes the bond in name of a child *in familia* delivery of the bond to the father has not naturally any other signification than that the bond, which comes in place of the money, is to be under his power as the money formerly was. It cannot import a delivery for behoof of the child: because the debtor who delivers the bond has no vote in the matter, but must deliver the bond to the father from whom he got the money." *Hill's* case has influenced every subsequent case of this class. The bond given by the debtor is regarded as becoming the property of the original creditor: so to speak, the original creditor " buys " the bond, whatever its form, and it belongs to him. Alternatively, the direction by the original creditor to the debtor may be regarded as a form of mandate to pay to the third party: this was the position in the case of *Stonehewer*. In any event, the rule of these cases, that the third party acquires no right without delivery or equivalent circumstances inferring donation, can only be understood on the basis that the original creditor retains control of the bond in spite of taking in return for the money he lays out an obligation to pay to a third party. The taking of a bond in favour of a third party is treated in just the same way as giving a direction to a debtor to pay to a third party subsequent to the date of the contract.

Taken literally, and in the wider sense, Stair's dictum is no doubt inconsistent with the rules laid down in *Hill* and the other cases of that class. It is however submitted that the reasons previously advanced for believing that Stair intended the dictum to bear the wider sense are strong enough to override that inconsistency. It is further submitted that it is not impossible to reconcile the two sets of rules. As was noted in *Stonehewer*, "traditionibus non nudis pactis transferuntur rerum dominia." The mere pact between creditor and debtor that a sum is to be repaid to a third party does not vest any right in the third party. The debtor's obligation remains the property of the original creditor—it is his to donate or not, as he wishes: for only by delivery is the right passed to the third party. Thus it is the influence of a general rule of the law of contract which is to be seen in the cases of *Hill* and the rest. Where, however, there is no question of a transfer of property from original creditor to third party, where the obligation is not something "acquired" by the original creditor, Stair's dictum may be applied in the wide sense. In cases of the latter variety, there is no room to apply the rule "traditionibus non nudis pactis."

The doctrine of *jus quaesitum tertio* has been analysed in a number of cases which fall into the first of Lord Dunedin's two categories. Perhaps the most important of these is *Finnie* v. *Glasgow and South Western Ry.* (1857) 3 Macq. 75. It was emphasised in that case that a *jus quaesitum* could not exist unless there was a stipulation directly for the *tertius*' benefit. It is not enough if the *tertius* benefits incidentally, as a member of the public—a principle which was applied in *Blumer & Co.* v. *Scott & Sons* (1874) 1 R. 379, and *Henderson* v. *Stubbs* (1894) 22 R. 51. However, in none of the cases of this class is there any hint of a rule requiring donation by B, the original promisee, to C, the *tertius*.[12] Moreover, the doctrine has been specially applied to feu contracts (in *Hislop* v. *MacRitchie's Trs.* (1881) 8 R.(H.L.) 95). In such a case delivery of the contract to a co-feuar, or circumstances showing an intention to donate anything to him, are not essential: it is hard to see how they could be. The co-feuar's right to enforce a restriction arises from the consent of feuar and superior, from their intention to give him that right signified in the making of the feu contract. There is no room here for any donation, and the wider sense of Stair's dictum clearly applies to cases of this class. Lord Dunedin in *Carmichael* (at p. 203) remarked that what is at the root of the co-feuar's *jus quaesitum* is that the *tertius* comes under onerous obligations in the faith of having a *jus quaesitum*. It is difficult to see how such a circumstance can be in any sense equivalent to or infer donation by the creditor to the *tertius*, *i.e.*, by the superior to the co-feuar. *Hislop's* case was concerned primarily with the circumstances in which intention to create a *jus quaesitum* might be inferred, but it was made clear that it was the consent of the contracting parties which was the basis of the *tertius*' right. Lord Watson (at p. 102) said "I am of opinion that no *jus quaesitum* can arise to any *tertius* except by the consent of both these contracting parties."

We have therefore two distinct types of case. In one, the third party has no right except by the donation of the original creditor: the original creditor acquires a bond or similar obligation, but although that bond is taken in name of the third party, that fact alone confers no *jus quaesitum*; in such cases, the original creditor is in some sense the owner of the sum in the bond until he transfers it to the *tertius*. To these cases Stair's dictum does not apply because, it appears, of the operation of the rule "traditionibus non nudis pactis." In the other class, that is, in all other cases, the third party acquires a right from the completion of an agreement in his favour and intended to benefit him. It is important to keep these classes distinct, since it is the failure to do so which gives rise to the conundrum "is it the existence of a *jus quaesitum* which makes the contract irrevocable or the irrevocability which creates the *jus quaesitum*?" The true position is that in the first class of case it is the donation, the *traditio* or its equivalent, which gives the third party an irrevocable right: in the second class, it is the completion of the contract which has this result. A revocable *jus quaesitum* is a contradiction in terms.

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[12] Other cases of this class are: *Peddie* v. *Brown* (1857) 3 Macq. 65; *Leslie* v. *Magistrates of Dundee* (1840) 3 D. 164; *Rose, Murison & Thomson* v. *Wingate, Birrell & Co.'s Tr.* (1889) 16 R. 1132; *Morton's Trs.* v. *Aged Christian Friend Society* (1899) 2 F. 82; *Lamont* v. *Burnett* (1901) 3 F. 797, and *Love* v. *Amalgamated Society of Lithographic Printers*, 1912 S.C. 1078; 1912, 2 S.L.T. 50.

The conclusion, then, to which the authorities point is that there is one class of case in which the third party acquires a right from the completion of a contract with a provision in his favour and intended to benefit him: and another class in which the third party's right depends upon a donation to him by the original creditor. The distinguishing mark of this second class is that the debtor's obligation can be regarded, when the contract is made, as belonging to the promisee or original creditor in spite of the terms in which it is expressed. That being so, it is impossible to give a simple account of the nature of *jus quaesitum* in Scots law. A third party's right might theoretically be explained in two ways: as arising either from the debtor's promise or from the promisee's donation. Scots law has adopted both these theories in different cases, and treats the *tertius*' right in terms of donation or in terms of promise, as may seem appropriate in the circumstances of the case.

J. T. CAMERON.

THE CONSTITUTION AND PROOF OF VOLUNTARY OBLIGATIONS

PART II

THE HERESY OF PATERSON v. *PATERSON*[1]

THE first part[2] of this article was concerned to show that, if there is a synthesis of voluntary obligations in Scots law, it is not contained in the proposition that the law infers a binding obligation from the unilateral declaration of consent to undertake it; and that the modern habit of describing and distinguishing between obligations as those which require writ in constitution, those which require writ *in modum probationis*, and those which may be proved *prout de jure*, leads to some bizarre results. The suggestion which concluded the first part was that if there is a synthesis it is more likely to be expressible in terms of a system of categories, with the consequence that if a promise does not fulfil the requirements of its category it is *nudum pactum*. It was further suggested that: (a) the doctrine of personal bar, whether in the form of *rei interventus*, homologation or otherwise, is relevant to all the categories; (b) where writ is required, "writ" means a writing which is probative whatever the category, and whether the writ is required by the general law or by the wish of the parties; and (c) the modern distinction between an obligation which requires writ in constitution and writ *in modum probationis* is in principle erroneous.

It is clear that these suggestions cannot live with much that was acceptable to a majority of the whole court in *Paterson*. There the court, following the trail blazed by Lord Kyllachy in *Bryan* v. *Butters Bros. & Co.*,[3] decided that the writ required to establish the existence of a loan, that is an obligation on the defender to repay the pursuer money alleged to have been lent by the latter to the former, need not be probative. To reach this decision the court had to affirm the proposition that a probative writ is required only where the obligation it contains is of a kind which requires writing for its constitution. So to do the court had to distinguish between an obligation which until formally constituted is not binding on the promisor and an obligation which so soon as made verbally is binding although proof of it is restricted to the writ or oath of the promisor. This distinction was justified by holding that in the case of the former the informality can be cured *rei interventu*, whereas to the latter *rei interventus* is irrelevant. In other words the argument was accepted that the relevance of *rei interventus* is to bar *locus poenitentiae*, and its awkward consequences were avoided by declaring it did not apply to an obligation which only required writ as evidence. The whole argument is, of course, circuitous. One thing more must be said before these decisions are considered. They and many of the decisions to which they refer make most confusing reading. All show that throughout the greater part of the nineteenth century there was acute conflict on the Bench on the questions here canvassed. A coherent pattern does emerge if these decisions are read with the understanding that a change was taking place due principally to the introduction of the jury system, of oral argument and the liberalisation of evidentiary rules. The device of " proof before answer " was making rapid headway. Of course, it is a contention of this article that the conflict arose out of the endeavours of certain of the judges to loosen the grip which formalism had always had on the law of voluntary obligations,[4] and that though their purpose was laudable, their solution has been disastrous.

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[1] (1897) 25 R. 144.

[2] *Ante*, p. 1.

[3] (1892) 19 R. 490.

In *Bryan* v. *Butters*,[5] Bryan as a partner of Butters

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[4] A most instructive case showing the deep cleavage of opinion between a traditionalist First Division and a more freedom-minded Second Division is *Haldane* v. *Speirs* (1872) 10 M. 537.

[5] (1892) 19 R. 490.

Bros. borrowed £100 from his wife to whom he gave an acknowledgment, written by a clerk of the firm, and signed, on his orders, by the cashier of the firm. The money was placed to the credit of his private account. Thereafter he deserted his wife and fled the country. Mrs. Bryan sued Butters Bros. for repayment, and founded on the acknowledgment. The defenders pleaded that as it was neither holograph nor tested the alleged loan was not instructed by legal evidence. The Lord Ordinary (Kyllachy) repelled the plea and granted decree on the ground that " where writing is required not as a matter of solemnity but only by way of proof, the writing need not be probative, but is sufficient if it be shown to be genuine."[6] The Second Division (*diss.* Lord Young) adhered.

Lord Kyllachy founded his opinion on the broad proposition that the writ need only be probative if the authenticating statutes apply, and the statutes only apply to " operative writings—writings founded on as constituting a title or constituting an obligation." The statutes apply if the writ is necessary as " the substantive *vinculum* on which action may be raised," and this cannot be so in the case of " writings produced *in modum probationis.*" To justify this proposition he relied on the following:

(1) That " in the proof of trust (where by statute writ or oath is necessary) any writ of the truster proved to be genuine is sufficient "—Bell's *Principles*, 1995.

(2) The decisions in *Ross* v. *Fidler*, November 24, 1809, F.C.; *Fraser* v. *Bruce* (1857) 20 D. 115; *Thoms* v. *Thoms* (1867) 6 M. 174; *M'Laren* v. *Howie* (1869) 8 M. 106; *Bathie* v. *Lord Wharncliffe* (1873) 11 M. 490.

(3) That " in the case of leases and other contracts relative to land, where there has been *rei interventus*, and writing is only required by way of proof, the writ requisite may be any genuine writing, and may even be a writing which is not subscribed." The reason why writing is only required by way of proof is that *rei interventus* bars *locus*

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[6] At p. 492.

poenitentiae so that " where there has been *rei interventus*, an improbative obligation is as good as one that is probative," but in the case of loan " having borrowed money, you cannot—money having passed—resile from your contract." Of these it can be said that the analogy of trust only lends some specious support; the decisions cited, if they go anywhere at all, go the other way, and the argument founded on the relevance of *rei interventus* assumes, but does not demonstrate, what is the corner-stone of the whole opinion, that where writ is required *in modum probationis* the obligation therein contained is good as a matter of constitution when made verbally.

If it be (as this article contends and as will be established later) that the true principle of the law was and is that where writ is required *in modum probationis* it is required as the symbolic and necessary act completing an otherwise inchoate obligation, the analogy of trust is misleading. Trust in its traditional form was never such an obligation. Conceptually it was regarded as a combination of the contracts of mandate and deposit.[7] It is true that this description and analysis are no longer regarded as adequate,[8] but the concept of trust, as it now is, is remote from this inquiry. Neither mandate nor deposit is a contract which requires writ either in constitution or in proof (in the sense in which these phrases are here used) and so originally " presumptions and parole evidence were admitted to establish the trust against the trustee or his representatives."[9] The Act 1696, c. 25, altered this by enacting that no action for declarator of trust shall be sustained " except upon a declaration or back bond of trust lawfully subscribed by the person alleged to be the trustee . . . or unless the same be referred to the oath of party *simpliciter*." Clearly the statute has never required the writ of the trustee so as to create or complete his obligation to hold in trust: its purpose, as judicially construed, has been, in the event of the alleged trustee denying the fact that a trust was ever created, to require the *soi-disant* truster to prove the fact by a writing under the hand of the other party out of which an admission of the fact can be spelled.[10] Indeed, until 1797, when the House of Lords in *Wight* v. *Duggan* [11] made it clear that some meaning had to be given to the Act of 1696, it was construed with great laxity and proof of facts and circumstances was allowed.[12] The court looked on it with the same distaste as did the English judges on the Statute of Frauds.[13]

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[7] Stair I.12.17: Erskine III.1.32: Bell's *Commentaries* I 30: and see *Cuningham* v. *Montgomerie* (1879) 6 R. 1333, and *Croskery* v. *Gilmour's Trs.* (1890) 17 R. 697.

[8] *Allen* v. *McCombie's Trs.*, 1909 S.C. 710; 1909, 1 S.L.T. 296; and see Smith: *Scotland*: British Commonwealth series at p. 875.

[9] Bell's *Dictionary* (7th ed.) at p. 1091.

In the decisions relied on by Lord Kyllachy are to be found dicta which support him. This is not surprising because of the emergence of the judicial conflict already referred to. *Ross* v. *Fidler* [14] is a case the precise ratio of which is, and will probably remain, an unsolved mystery. Even the facts are shrouded in obscurity, but this much is clear, that: (a) it was an action for repayment of an alleged loan; (b) the documents produced were (1) a letter by the defender asking for money, (2) a cheque in answer, drawn by the pursuer, payable to the defender or bearer and cashed by the defender, and (3) another letter, holograph of the defender, to the cashier of the bank asking him to send the money with the messenger; and (c) a proof of facts and circumstances was allowed in the inferior court where the cause originated. The decision was examined by both the majority and the minority in the Seven Judges case of *Haldane* v. *Speirs*.[15] There the pursuer had cited the decision for the proposition that once there is a writing of any kind soever of the defender which shows that money has passed between the parties it is competent to allow inquiry *prout de jure* to ascertain *quo animo* the money passed. In *Haldane* Lord Deas accepted that proposition and subjected *Ross* v. *Fidler* to detailed examination as an important authority for it. None of the majority accepted his gloss. Lord President Inglis asserted emphatically that the court had ignored the proof led in the inferior court and " that the whole contention in the case was on the construction of the writings " (p. 542). Lord Benholme commented that most of the observations of Lord Deas struck him as new, " especially his elaborate investigation of the case of *Ross* v. *Fidler* " (at p. 557). Lord Neaves said that the only doctrine which that case established is " that where a party gives a document under his hand, importing the receipt of money, if he does not ascribe it to another cause when he has the opportunity, he is to be held as having received a loan, and is bound to repay it," but there must be evidence of a loan " in the granting of an acknowledgment or chirographum constituting or inferring an obligation to repay " (at p. 559). Lord Cowan explained *Ross* v. *Fidler* as establishing the principle " that where a document or writing, admitting the receipt of money, is given to the party advancing the amount by the party who receives it, it will be presumed that an obligation to repay is thereby *constituted* [16]—unless the party who has received the money shall establish that it was paid to extinguish some counter obligation, or to satisfy some other demand " (at p. 543).

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[10] *Cf*. *Seth* v. *Hain* (1855) 17 D. 1117, *per* Lord Wood at p. 1124.

[11] 3 Pat. 610.

[12] *Gilmour* v. *Arbuthnot* (1765) Mor. 12758; *Stewart's Exrs*. v. *Stewart* (1777) 5 Brown's Suppl. 631.

[13] *Cf*. Cheshire and Fifoot: *The Law of Contract* (5th ed.) p. 148 *et seq*.

[14] November 24, 1809, F.C.

[15] (1872) 10 M. 537.

This principle *semble* was applied in *Fraser* v. *Bruce*,[17] described by Lord Justice-Clerk Hope in his opinion " as a very special case," [18] and by Lord President Inglis in *Haldane* v. *Speirs* as having peculiar circumstances and being " undoubtedly a narrow case." The pursuer founded on his savings bank pass book which contained an entry showing that the defender had received money from the bank out of the pursuer's account and had signed for it. It was held that pursuant to the regulations under the Savings

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[16] Writer's italics.

[17] (1857) 20 D. 115.

[18] In the report 30 Sc. Jur. 70 at p. 72 the relevant sentence is—" We must take this as a very special case, and the decision in which is not likely to be applicable to any other."

Bank Act the entry and signature were a good voucher against the bank; therefore, they were a good voucher in favour of the pursuer.

Thoms v. *Thoms*,[19] although equivocal, is on any view against Lord Kyllachy. A and B granted to C a joint and several promissory note for £600. C recovered the whole from B, who brought an action against A's representatives concluding for payment of the £600 on the ground that he had joined in the note only for the accommodation of A. He produced a letter, of even date with the note, signed by but not holograph of A, admitting this fact. The defender took the plea that as the letter was neither holograph nor tested it was inadmissible as A's writ. Lord Cowan, who took the view that what was in issue was the constitution of an obligation of relief, held that, as the letter was *pars ejusdem negotii* of the granting of the bill and was fortified *rei interventu*, although not tested or holograph, it was conclusive evidence of the fact which it attested. Lord Benholme was of the opinion that what was in issue was merely the liability *inter se* of co-acceptors of a bill and, as it is only a presumption that one of the acceptors paying is entitled to be relieved by his co-acceptor to the extent of one half of the sum paid, evidence, which need not be in the form of a probative writ, may be led to redargue the presumption. Lord Neaves and Lord Justice-Clerk Patton adopted both views; but, assuming the issue to be the constitution of an obligation of relief, they surmounted the difficulty of the improbative letter by holding that as the bill was privileged so also was the letter as part of a mercantile transaction.

Among the headnotes to *M'Laren* v. *Howie*[20] there is the statement—" A receipt for a legacy, neither holograph or tested, after proof that the signature is genuine, is competent evidence of payment," and to the extent that Lord Benholme did make a statement of that kind, the headnote as a précis is accurate; but the case had nothing to do with a legacy and the discharge thereof by an improbative receipt. The facts were that the testator had in his will made a provision in favour of the pursuer, his daughter, in full satisfaction of legitim. During his lifetime the pursuer wrote several holograph letters to her father asking him to pay her off and she would give him her discharge.[21] Payments were made by the deceased in the amount of the provision, so that the question was whether there had been a transaction during the testator's life anticipating the provision, and it was held that this transaction was proved on the basis of the pursuer's holograph letters. The question of an improbative receipt arose from the fact that after the testator's death the defenders, as his trustees, prepared a receipt which the pursuer signed. This receipt was not holograph or tested. Lord Cowan explicitly (and Lord Justice-Clerk Moncreiff and Lord Neaves implicitly) held that to the extent, if at all, that the receipt was evidence it was adopted by the holograph letters; Lord Benholme alone opined that an improbative receipt was a good discharge if proved genuine. Lord Neaves was so troubled by some views thrown out in the course of discussion that to guard himself against supposed accession to them he said, " as a general rule, no document of importance that is not *in re mercatoria* is binding unless probative " (at p. 111).

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[19] (1867) 6 M. 174.

[20] (1869) 8 M. 106.

Bathie v. *Wharncliffe*[22] was a simple enough case. The pursuer, as tenant, averred a verbal agreement of lease for nineteen years. She produced a draft lease prepared by and for the defender, and relevantly averred *rei interventus*. The court had no difficulty in holding that there was a good lease. Lord Kyllachy could only have cited the decision for Lord Ardmillan's remark " we recognise *rei interventus* as a clear equitable check upon any man resiling from an informal transaction."

The only decision which Lord Kyllachy considered as apparently against him was that of *Stewart* v. *Syme*,[23] saying of it " which is said to derive importance from being referred to without disapproval by the present Lord President in the case of *Haldane* v. *Speirs*. I am bound to say that I think the judgment in that case does appear to require explanation, but the case was one of a rather special character,[24] arising on a bill of exchange, and where the acknowledgment of indebtedness founded on was not only not probative, but was, as the court held, not sufficiently connected with the bill to which it was sought to be applied. I cannot think that this case is an authority for the proposition that loan must always be proved by a probative writ; and I am satisfied that in citing the case, which he did for another purpose, the Lord President did not intend to affirm that proposition." [25] In *Haldane* Lord President Inglis was well aware that the Second Division was bent on reform and, therefore, took considerable trouble to propound principles and cite authorities which, as he said, might give his "opinion somewhat of an elementary character." [26] He was determined to maintain the strictness of the rule of writ or oath, and it is highly unlikely that he was not well aware of what he was about. He commenced his opinion with a reference to and description of *Stewart* v. *Syme* as one "of the best known and most instructive cases" on the rule. He said "an action was raised against the children of the deceased Alexander Syme, and their factor *loco tutoris*, for repayment of £130, contained in a bill alleged to have been for the accommodation of Syme, and in order to show that the proceeds had been applied for Syme's behoof, the pursuer founded on a missive letter. Lord Pitmilly, Ordinary, found 'that the written document, dated 6th April 1813, bearing to be an acknowledgment of debt to the amount of £130 by the late Alexander Syme to the pursuer, and which both the defender and pursuer state to have been written by the defender James Fraser, *is destitute of the legal solemnities, and not actionable* [27]; and finds that the attempt to connect this informal document with the bill produced, which is drawn by a person of the name of John Fraser on the pursuer, and on which the name of the late Alexander Syme does not appear, by the parole testimony of the persons said to have been present when these transactions were completed, is irrelevant and inadmissible; therefore assoilzies the defender from the conclusions of the libel.' The court adhered. That appears to me a very plain and instructive application of the general rule." [28]

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[21] The letters are set out in the report 42 Sc. Jur. 52.

[22] (1873) 11 M. 490.

[23] December 12, 1815, F.C.

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[24] As also were most of the cases on which he so confidently relied.

[25] (1892) 19 R. at p. 493.

[26] (1872) 10 M. at p. 539.

[27] Writer's italics.

The same subjective interpretation of authorities is apparent in Lord Kyllachy's treatment of Erskine whom he cites at IV.2.4, saying—" Thus entries in a debtor's books, although in the handwriting of a clerk, have been held sufficient." [29] What Erskine in truth says is " Sundry private deeds, though not subscribed by the party, are in some respects probative. Thus, books of accounts kept by merchants, manufacturers, shopkeepers, and dealers in business are, without subscription, probative against themselves, whether they be holograph or written by a clerk; because he who keeps books is presumed to intend that they should pass for a legal evidence of the state of his affairs, and have the same force as if he had signed a declaration subjoined to every article." This is eminently sensible, and indeed a particular instance of the application of the rule that mercantile writings are privileged being exempt from the authenticating statutes,[30] but far from being in support of Lord Kyllachy's proposition the passage from Erskine is destructive of it. On the contrary it is clear from the whole of Erskine's text [31] that for him proof *scripto* meant proof by a writing which is probative, either because it satisfies the statutes or because for one reason or another it is deemed probative.

Lord Kyllachy's final argument was, as already mentioned, that *rei interventus* connotes *locus poenitentiae*, therefore, *rei interventus* cannot be relevant to loan; because *rei interventus* is not relevant to loan, therefore, loan may be proved by improbative writ. This merits recognition as a *locus classicus* of the misuse of the syllogism. It is a superb example of circular reasoning, but consideration of the argument may be postponed until *Paterson* v. *Paterson*[32] has been examined.

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[28] *Loc. cit.*

[29] (1892) 19 R. at p. 493.

[30] Compare *Nasmith* v. *Bower* (1665) Mor. 12621, with *Watson* v. *Brown* (1710) Mor. 12628; and *Knox* v. *Martin* (1850) 12 D. 719, with *Catto* v. *Thomson* (1867) 6 M. 54.

[31] Title II of Bk. IV.

Paterson was an action for repayment of a loan, and the pursuer founded on an acknowledgment or receipt which was improbative. It pointedly raised the validity of the decision in *Bryan* v. *Butters*, and was intended to be decisive. "I must regard the reference now made by the judges of the First Division to the whole court as indicating that, in their opinion, this case affords an opportunity, which ought to be taken, of obtaining the opinion of all the judges on the general question whether or not the admissibility of evidence to prove loans of money of large amount, not *in re mercatoria*, is limited by any rule of law, and if so, what that rule is, and what the limitation resting on it."[33] That the majority,[34] for whom Lord Kyllachy delivered the leading opinion, was bent on upholding *Bryan* v. *Butters* there seems little doubt, as this somewhat curious comment by Lord Kincairney testifies: "I do not think it necessary to inquire whether the cases of *Syme*, *Alexander*, and *Miller* can be of much use as authorities, if the decision in *Bryan* v. *Butters* be supported. That seems somewhat doubtful; but it is true that the documents referred to in these cases differed in character from the receipt now in question, and there were other features which may distinguish them. But in any case I am not prepared to go back on the judgment in *Bryan* v. *Butters*."[35]

Lord Kyllachy's opinion, although more elaborate than that which he delivered in *Bryan*, was in substance the same, even to the technique of manipulating previous decisions as he thought fit. This time he specially considered *Alexander* v. *Alexander*,[36] *Jones* v. *Farquharson*,[37] *Stewart* v. *Syme*,[38] and *Haldane* v. *Speirs*.[39]

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[32] (1897) 25 R. 144.

[33] At p. 159 *per* Lord Young who dissented with the concurrence of Lord Adam.

[34] Lord President Robertson, Lord Justice-Clerk Macdonald, and Lords Kyllachy, Trayner, Moncreiff, Kincairney, Stormonth-Darling, Low, Pearson, McLaren and Kinnear.

[35] At p. 181.

Of *Alexander* he took the view that in the special circumstances it seemed that the pursuer required to table " a written obligation constituting an independent debt. Accordingly the question raised in *Bryan* v. *Butters* and in this case was not, it appears, even argued." [40] It is almost sufficient in reply to this to compare the headnotes of *Paterson* and *Alexander*. The former reads, " *Held* . . . that in proving a loan of money by writ it is not necessary that the writ should be holograph or tested " ; the latter reads, " Document in the shape of a letter, not holograph nor tested, but signed and addressed by a son to his father, acknowledging a loan of £400 to stock a farm, not privileged as *in re mercatoria*, and therefore improbative." [41] Alexander died on April 3rd, 1826, the letter was dated November 21, 1818.[42] The defender took the plea that the letter was improbative, not tested, not *in re mercatoria*.[43] The pursuer reclaimed. The court adhered, Lord Balgray saying, " the letter for £400 cannot be held *in re mercatoria*. If it were so, I do not see how any document at borrowing £400 or £500 might not be said to be *in re mercatoria* also. It is just an improbative bond." [44] In one respect only is Lord Kyllachy's comment correct, namely that the point in *Paterson* was not argued for the simple reason that in 1830 it was unarguable. It is clear from the pursuer's reference to *Goodlet*,[45] that his counsel knew that his only hope of success was to have the letter treated as privileged. That the court was well aware of what it was doing is manifested by Lord Balgray's reference to an " improbative bond," for as Lord Young pointed out in *Paterson* the principle behind the view acceptable to the majority could only mean that any obligation to pay money need not be contained in a probative writ.[46]

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[36] (1830) 8 S. 602.

[37] (1835) 13 S. 838.

[38] December 12, 1815, F.C.

[39] (1872) 10 M. 537.

[40] At p. 176.

[41] The headnote in the report 2 Sc.Jur. 272 is even more succinct: " That an acknowledgment of having borrowed money required the solemnities of the Statute 1681."

[42] Lord Kyllachy said that the loan was eighteen years old!

[43] Which is indistinguishable from the plea taken by the defender in *Paterson*.

[44] The report 2 Sc.Jur. 272 reads: " Were unanimously of the opinion, that the letter . . . not being holograph nor tested in terms of the Statute, could not be received as evidence of the debt."

[45] (1739) Mor. 16932.

Jones v. *Farquharson*, Lord Kyllachy distinguished and dismissed as a case of cautionary obligation. No question of cautionry arose. Thomson, Farquharson and Angus signed a document—" we hereby acknowledge to have received from Margaret Miller £80 sterling, for which we pay her interest at the rate of 5 per cent. per annum, and we oblige ourselves to repay the principal at any time on getting six months' notice," which was holograph of Thomson. The pursuer, as executrix of the lender, sued for payment. Farquharson pleaded " that no part of the sum sued for was ever advanced to him,"[47] admitted his signature, and took the point that the document was an unstamped promissory note. This was repelled. He then pleaded that it was not holograph of him; and being informal and improbative, was not binding upon him. The Lord Ordinary (Corehouse) sustained this plea and pronounced this interlocutor: " In respect the written agreement libelled upon is neither holograph of the defender . . . nor framed in conformity with the provisions of the Act 1681, chap. 5, assoilzies the said defender." The court regarded the document as a bond, and the defender as a principal debtor.

As for *Stewart* v. *Syme* he confessed that in *Bryan* v. *Butters* he had overlooked the precise terms of the document which were: " I, Alexander Syme, vintner in Inver, acknowledge that I am due Charles Stewart, Craigdow, £130 sterling, for which I shall pay the said Charles Stewart, on June the 6th or 9th, 1813. Signed Alexander Syme, Dunkeld, April 6, 1813." The averments were that the pursuer had accepted a bill drawn on him for that amount by Fraser in order to accommodate Syme. The document was rejected as a writ because improbative. Lord Kyllachy's gloss was: " It was somehow assumed to be an acknowledgment of *loan;* but in point of fact it was simply an acknowledgment of *indebtedness*, followed by a promise to pay on a certain date. It was not, therefore, evidence either of the contract of loan or of any other particular contract." [48] As Lord Young said, this was incomprehensible, " the question was not whether the writ proved a contract of loan or any other contract, but whether it proved an acknowledgment of indebtedness in the sum of £130." [49]

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[46] At p. 151.
[47] 7 Sc.Jur. 96.

The most subjective treatment of all was reserved for *Haldane* v. *Speirs*, a case to which reference has been made more than once. It was an important case, and a trial of strength between the traditionalists led by Lord President Inglis and the then reformers led by Lord Deas. The facts were simple. The pursuer averred a loan of money to the defender, and produced his bank cheque in favour of the defender and indorsed by him. The defender admitted that he had received payment of the cheque but in satisfaction of a debt owing him by the pursuer. The pursuer's argument was, " there is written proof in the shape of this cheque that the defender received money from me, I am entitled to a proof of facts and circumstances *quo animo* the money was received." The Lord Ordinary (Ormidale) allowed a proof before answer. The defender reclaimed and argued that the allowance of a mixed proof was incompetent. The pursuer argued that he was entitled to a proof at large to show *quo animo* the cheque was granted. The case was argued before the judges of the First Division, with three judges of the Second Division. It was held by a majority that (a) an allowance of proof *prout de jure*, was incompetent; and (b) the cheque was insufficient as proof *scripto*. The interlocutor pronounced makes this quite clear—" Recall the interlocutor . . . reclaimed against. Find that the loan libelled can be proved only by writ or oath of the defender. Find that the said loan is not proved *scripto* of the defender by the bank cheque. . . ." The Lord President wrote a voluminous opinion demonstrating that parole proof was incompetent, and that whatever else had been done in the past, parole proof had never been allowed of the constitution of the debt; and, after referring to a number of cases in which the court had found the debt proved on a construction of the writings produced, he concluded: " That is certainly very different from what the Lord Ordinary has done in this case which is not to find the writing sufficient to prove a loan, but to allow a proof *prout de jure* " (at p. 543). Lord Cowan said, " The case is not one which permits of parole proof " (at p. 544). Lord Benholme said, " Now, it has always appeared to me that the remedy of allowing a proof ' before answer ' is inapplicable where an objection to the competency of the proof is taken " (at p. 557): likewise Lord Neaves: " But to allow proof said to be incompetent before answer as to its competency seems an illogical proceeding " (at p. 558). The position of the minority was less unequivocal. They were anxious to relax the strictness of the rule: " The equitable principles evolved in the progressive jurisprudence of this country have, in several instances, been, with great advantage and great propriety, applied in construction and application of the stricter and narrower rules of our older law. The restrictions of evidence, when not statutory, have yielded to the demand for light, as the *metus perjuriae* has yielded to the desire for truth " (*per* Lord Ardmillan at p. 564). All took their stand on the alleged principle that " when it is competently proved that one man has received a certain amount of another man's money, the recipient must account for and repay that money, unless he can establish that he received it on some other footing than that of loan or obligation to repay " (*per* Lord Deas at p. 548), but none, with perhaps the exception of Lord Kinloch, was prepared to hold that the mere passing of a bank cheque raised that presumption. Thus the minority was forced into the position of arguing " that when there is written evidence that one man has received the money of another, inquiry is competent *prout de jure* to ascertain *quo animo* or on what footing he so received the money " (*per* Lord Deas at p. 548). Lord Ardmillan said " I am humbly of opinion that inquiry cannot justly be denied. The basis of the pursuer's case is writing. The question is, on what footing did that writing pass? *Quo animo* was that writing delivered? I think that the Lord Ordinary has come to a sound result and has rightly allowed to both parties a proof of their respective averments—the pursuer to lead in the proof " (at p. 563).

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[48] At p. 176.
[49] At p. 154.

Of all this Lord Kyllachy said " The case was in short decided not on the competency of the writ, as an item of evidence, but on its sufficiency. Indeed it seems to have been conceded by the majority (notably by the Lord President) that if the writ, such as it was, had been delivered to the creditor as *his* voucher, and not merely to the bank as *their* voucher, the decision must have been different. I therefore consider that the case of *Haldane* v. *Speirs* is a strong authority for the pursuer." [50] If a certain paragraph of the Lord President's opinion is taken out of its context it does give specious support to Lord Kyllachy's interpretation. The Lord President had made it quite clear that in his opinion a cheque was worthless as a writ. " The notion that the bank cheque is a writ of the defender, in a question of loan, I have never been able to understand. I cannot see that it makes the least difference when the money passed whether it passed in the shape of a cheque, or of notes, or of gold. The fact is just the same in all—the passing of money from one hand to another . . . . A cheque is nothing more than a convenient way of passing money." Then follows the paragraph on which Lord Kyllachy seized: " But it is necessary carefully to distinguish between such a document as this and documents held to constitute proof of loan—I mean acknowledgment of receipt of money. Many such cases have occurred, in which the alleged loan was held as proved, where the acknowledgment was held as constituting the lender's document of debt. But I am not aware of any case where a document not in the hands of the lender was held to prove a loan. It is its being in the hands of the lender that gives point and meaning to the document. I refer to that class of documents known as I.O.U's, where the writer states in his own handwriting, and under his own signature, that he has received so much money, and gives that document to the lender to hold as his writ. That is held to constitute a loan" (at p. 541). Thereafter, and in the next succeeding paragraph, in order to impress his opinion of the worthlessness of a cheque, delivered or not, the Lord President said: "But I think that the view which has been taken of cheques is not to be left out of account," and referred with approbation to *Gow's Exrs* v. *Sim* [51] and to *Rutherford's Exrs.* v. *Marshall's Exrs*, "as very instructive on the general doctrine." [52] In the former the admitted facts were that the deceased had written out a bank draft in favour of the defender which he took to the bank and cashed, applying the money to his own use. The deceased's executors claimed repayment and were compelled to refer the matter to the defender's oath because as Lord Cowan observed "There is no writing, and it was indispensable to refer, not the subsistence only, but the constitution of the debt to the defender's oath" (at p. 581). Lord Neaves made the point crystal clear: "Here we start with a document, but a document of a kind which does not acknowledge anything, and does not therefore import or infer an obligation to repay. . . . A bank draft constituted no obligation on the payee to repay the money: the presumption rather is that it was granted in extinction of a debt, or for some other onerous cause." The headnote of the latter sufficiently states the facts: "In an action for payment of a sum of money alleged to have been lent—*held* (1) that the debt could competently be proved only by writ or oath; (2) that the debt was not proved *scripto* by two letters from the defender to the alleged lender, expressing regret for not having ‘ cancelled the debt I owe you ’ and asking if the lender would take ‘ a bill for the amount,’ but without mentioning the sum, or the nature of the debt referred to; and (3) that a proof *prout de iure* as to the nature and amount of the debt was incompetent.” There is nothing in the opinions of the majority in *Haldane* v. *Speirs* to justify Lord Kyllachy’s interpretation. Not one was prepared to accept the cheque as a writ even if delivered. As Lord Neaves said, “ if the giving of the cheque does not prove or presume a loan, how can the defender’s putting his name on the back of it prove anything more than that he drew the money? His writing of his name raises no greater presumption than his getting of the cheque did, nor makes him more a debtor than he was before ” (at p. 558).

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[50] At p. 176.

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[51] (1866) 4 M. 578.

[52] (1861) 23 D. 1276.

In the end, however, the keystone of Lord Kyllachy’s opinion was his argument that *rei interventus* is not relevant where writ is not required as a solemnity. “ Everybody acknowledges that it is a doctrine which belongs to the law of the constitution of obligations, and has nothing to do with the law of evidence. It is simply . . . a qualification of the doctrine that in obligations which are still imperfect there is *locus poenitentiae*.”[53] He based this conclusion on the following reason: loan is a composite contract whereby one agrees to lend money and the recipient to repay it; once the money has passed the contract is part executed, but the mere passing of the money proves nothing,[54] and passing of the money is *rei interventus*, therefore *rei interventus* is not applicable to loan; therefore *rei interventus* applies only where writ is required in constitution, therefore writ is not required as a solemnity in the case of loan. This explains what he meant when he said: “ If, therefore, it should be held (contrary to my opinion) that, by our law of evidence, loan can only be proved by probative writing, nobody will, I think, suggest that it makes any difference that the money has passed. But if (also contrary to my opinion) it should be held that every writing which acknowledges the receipt of money, or the receipt of money in loan, is thereby elevated to the rank of an *obligatio literis*, then I do say—and I think it follows as a matter of course—that the *obligatio literis* must be taken with its attendant doctrines of homologation and *rei interventus*; that is to say, must receive effect, however informal, if, by homologation or *rei interventus*, the right to resile is barred." [55]

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[53] At p. 177.

[54] Which is so.

This was a valiant attempt to unscramble the chaos which was bit by bit spreading through the law, and which has now spread so far that it is extraordinarily difficult to know where to begin any attempt to expound the law intelligibly. The first thing to notice about this passage is the assertion that *rei interventus* is not part of the law of evidence, and the juxtaposition of homologation and *rei interventus*. It is a fair construction of the passage that Lord Kyllachy also considered homologation to be part of the law of the constitution of obligations. In so doing he conveniently ignored the decision in *McCalman* v. *McArthur* [56] where the First Division unanimously held in an action for repayment of a loan that the debtor had homologated an informal document of debt by payments of interest. The Lord Ordinary (Kinloch) had proceeded on the ground of *rei interventus*, namely, the passing of the money. Of this the Division did not approve (save for Lord Ardmillan who at all times was an apostle of the new liberalism), and Lord Deas remarked: "*Rei interventus* is something done by a creditor upon the faith of the document of debt. But payment of interest is something done by the debtor, and cannot be regarded as *rei interventus*. The payments of interest come rather under the category of homologation, which is the act of the debtor in an obligation. I think the acts of the defender here do amount to homologation." [57] What is also significant about this case is, and necessarily so, that none of the judges had any doubt that the document to be obligatory *per se* required to be probative.[58]

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[55] At p. 177.
[56] (1864) 2 M. 678.
[57] At p. 682.

Although Lord Kyllachy ignored *McCalman* v. *McArthur*, two of his brethren of the majority did not. Lord Pearson said, " As the pursuer founds on the law as to *rei interventus*, I may say that this seems to me to have no application to the contract of loan itself, though it may apply to an agreement to make a loan. *Rei interventus* has the practical effect of perfecting an incomplete contract—that is, a contract which is incomplete in its constitution. But in loan the *rei interventus* makes the contract. Homologation is of course another matter." [59] If this has any meaning at all, which is doubtful, it can but mean that, whereas homologation can prove a contract, *rei interventus* cannot. Lord Kyllachy did not make this distinction: nor did Lord Kincairney who expressed the opinion that, if it was the law that the writ required in the case of loan was a probative writ, then, in the instant case there was room for a plea of homologation, and added: " The effect of *rei interventus* and also of homologation on a written obligation appears to be to make the statutes inapplicable to the document, whether it be a bond or not." [60] For this he cited *McCalman* v. *McArthur* as " a very important case on this precise point." How he could so do, and yet remain in the majority, is a mystery.

The confusion, with its peculiar consequences, arises out of the modern artificial distinction between writing required in constitution and writing required *in modum probationis*. That it is an erroneous distinction will be demonstrated later.

What also greatly assisted Lord Kyllachy is the fact that a plea of *rei interventus stricto sensu* can seldom avail in an action for repayment of money lent. In such an action it is the obligation of the debtor which is looked at, and the nature of the transaction is such that after the creditor has handed over the money there is little left for him to do on the faith of the obligation. Not all acts done on the faith of an obligation are necessarily *res interveniens*, for as Lord Deas said in *McCalman* v. *McArthur*, " I am not prepared to hold that wherever a person takes an improbative document of debt, and then puts himself in the witness box, and deposes that he advanced the money, that affords legal evidence of the advance, and sets up the document." [61] The reason, as Lord President Inglis pointed out so vigorously in *Haldane* v. *Speirs*,[62] is that the mere passing of money is so equivocal an act that it tells nothing in itself about the circumstances under which the act took place. Where Lord Kyllachy erred was in concluding, from the fact that the mere passing of money is not *res interveniens* in respect of a borrower's obligation to repay, that the doctrine of *rei interventus* is irrelevant because, as he rationalised, it appertains only to obligations which require writ by constitution, therefore the borrower's obligation only requires writ in evidence. Whenever the obligation sued on is an obligation to pay money an averment by the creditor that because of the debtor's undertaking to pay he advanced the money either to the debtor, or, as in the case of cautionry, to someone else, is seldom a relevant averment of *rei interventus*. Thus in *Johnston* v. *Grant*, Lord Justice-Clerk Hope said: " My main difficulty has been, seeing that this is a proper money obligation, whether the mere advance of the money is in the proper meaning of the term *rei interventus*, so as to render an improbative writing as effectual as a regular deed under the statute? I do not think the older authorities had any such notion. I believe they looked to other and subsequent acts, not merely the matter to which the writing applies; and I can hardly conceive (if the point were altogether open) a more unwarrantable evasion of a statute, than to say—this is a writing for money; and hence the payment of money, and by another party, makes it as good as a perfect deed. I own I think *rei interventus* means a different state of facts altogether." [63] In *Church of England Life and Fire Assurance Co.* v. *Hodges* where the court allowed a proof before answer the same judge said: " I will not enter at present into the discussion of the point of controversy . . . whether what was termed the fulfilment of counter part of the obligation in return for, and at the time of receiving the imperfect writing, such as payment across the table when the deed is signed, is *rei interventus*. There may or may not be difficulty as to that point in the abstract. But the actual facts in the particular case may often give a complete and marked character to the act of fulfilment." [64] It may well be " a very delicate question whether payment of a sum of money, *unico contextu* with delivery of an improbative document acknowledging the payment, can be regarded as *rei interventus* " [65]: it does not follow that it can never be.

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[58] The Lord Ordinary clearly considered that the document required to be probative and none of the judges in the Division disapproved of his comments in this respect.

[59] At p. 188.

[60] At pp. 181–182.

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[61] (1864) 2 M. at p. 682.

[62] (1872) 10 M. 539.

It remains to notice one further error of Lord Kyllachy which coloured the whole of his opinion, namely, his belief that the problem he was considering was that of a bilateral contract. He assumed that what was in issue was whether there had been a loan of money by the pursuer to the defender. This was an understandable assumption because the pursuer always avers he lent the money, and it is commonly said he must prove loan. This is not strictly accurate: what he has to prove is not that he lent the money, but that the defender is under an obligation to pay him money. Lord Kyllachy ignored this for reasons essential to his argument; for, if once he had conceded that what had to be proved was an obligation to pay, he could not distinguish such decisions as *Stewart* v. *Syme* [66] and *Alexander* v. *Alexander*.[67] He distinguished the former on the ground that the acknowledgment was of indebtedness and not of loan: therefore as an independent obligation to pay it had to be probative. He distinguished the latter on the ground that the loan acknowledged was eighteen years old (in fact it was only eight when the borrower died); therefore, " it may well have been held that it could only be done by tabling a written obligation constituting an independent debt." Similarly he had to concede that " an I.O.U. must be either holograph or tested," and the obligation to pay contained in a bond " is of course null unless the writing is probative." [68] Perhaps there is much uncertainty in this chapter of Scots law, but one thing is certain, that an obligation to pay money must be established by writ or oath, and conversely payment of money in discharge of any obligation (other than a ready money transaction) must be established by writ or oath, as the defender in *Hope Bros.* v. *Morrison* [69] found to his cost. The aversion of Scots law to parole evidence in respect of money obligations amounts to paranoia.

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[63] (1844) 6 D. 875 at p. 888.

[64] (1857) 19 D. 414 at p. 423.

[65] *Per* Lord Ardmillan in *McCalman* v. *McArthur* (1864) 2 M. at p. 683.

[66] December 12, 1815, F.C.

[67] (1830) 8 S. 602.

The matter is best tested by considering proof of a promise to lend. Hume says " our rule is grounded on the ordinary course of doing this sort of business in the world, which being that all engagements to lend or advance money are in a written form, and that no prudent man at all relies on any other; so the law holds that all verbal promises or engagements of this sort are no relevant grounds of action, but expressions only of the party's purpose at the time, and subject to be retracted at his pleasure." [70] He also makes it clear that save in mercantile transactions, or where there is *rei interventus*, the writing must be probative, and, of course, the writing must be delivered. Assume A does grant such a writing to B and does advance the money, but takes no acknowledgment from him, can A prove the loan, that is, B's obligation to pay? It is thought not; A cannot even prove the payment save *scripto vel juramento*. But not only must he prove the payment, he must also prove the obligation to repay. If he can prove the payment *as a loan* then he also proves the obligation to repay, but, as is frequently the case, if he can only prove the payment as a matter of receipt, he fails. The question which has frequently troubled the courts is whether the acknowledgment by the defender can as a matter of construction be read not merely as a receipt of the money, but as a receipt of money paid on the footing that it was to be paid back. This question did not arise in *Alexander* but it did arise in *Ross* v. *Fidler*[71] and the cases to which it gave rise, including *Stewart* v. *Syme*. This is when the distinction between an acknowledgment of receipt and an acknowledgment of loan becomes important. The former contains no obligation to repay: so the lender must produce another writing if he is to succeed. The distinction does not mean, as Lord Kyllachy would have it mean, that because the obligation to repay is expressed as an acknowledgment of receipt of money by way of loan, an improbative writing is sufficient. Otherwise, as Lord Young pointed out, this would mean that "a writing in these terms 'I, A.B., acknowledge to have received from C.D. the sum of £400 in loan for a year at 5 per. cent.' would not fall under the statutes, but would, if there were added these words—'and I oblige myself to repay the same'."[72]

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[68] 25 R. at pp. 176–177.
[69] 1960 S.C. 1; 1960 S.L.T. 80.
[70] Hume's *Lectures* Vol. II at p. 125.

J. J. Gow

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[71] November 24, 1809, F.C.

[72] *Paterson* (1897) 25 R. at p. 151.

CONSTITUTIONAL DEVELOPMENT IN THE COLONIES—ADEN

ADEN was established as a Crown Colony only in 1937. In terms of history that is comparatively recently and enables to be done what might not only be of interest but also of value, namely, to put on record a complete summary of the constitutional development of that territory from the date of its creation as a colony.

Prior to 1937 the peninsula of Aden situated on the southern coast of Arabia and lying on the Red Sea trade route between Europe and the East, which was first occupied by the British in 1839 and administered by the Government of India, was the Chief Commissioner's Province of Aden, a part of British India. In the Government of India Act, 1935,[1] provision was included in section 288 that—

> " (1) On such date as His Majesty may by Order in Council appoint (in this section referred to as ' the appointed day ') the then existing Chief Commissioner's Province of Aden (in this section referred to as ' Aden ') shall cease to be a part of British India.
>
> " (2) At any time after the passing of this Act it shall be lawful for His Majesty in Council to make such provisions as he deems proper for the government of Aden after the appointed day, and any such Order in Council may delegate to any person or persons within Aden power to make laws for the peace, order and good government of Aden, without prejudice to the power of His Majesty in Council, notwithstanding such delegation, from time to time to make laws for any of the purposes aforesaid."

In accordance with the terms of that section provision was made by the Aden Colony Order, 1936,[2] for the government of the new Crown Colony. Sections 3 and 4 of that Order in Council set out that the territory referred to in the Government of India Act, 1935, as the Chief Commissioner's Province of Aden should, with effect from April 1, 1937, be known as the Colony of Aden. The office of Governor and Commander-in-Chief of the Colony was created and both executive and legislative powers were conferred on the holder of that office. The Governor was His Majesty's representative in the Colony and he was directed, in the exercise of the powers conferred and the duties imposed upon him, by Royal Instructions.[3] These Instructions, issued contemporaneously with the Aden Colony Order in Council, required the Governor, in the exercise of his executive powers, to consult an Executive Council (consisting of such number of persons as His Majesty might from time to time appoint) in all matters except those of a trivial or urgent nature or where His Majesty's interests might, by prior consultation with the Council, be prejudiced. In the case of all matters too urgent to admit of the advice of the Executive Council being sought, the Governor was required at the earliest practicable time to communicate to the Council the action he had taken and the reasons therefor. The Governor alone was entitled to submit questions to the Council for their advice or decision; but if the Governor declined to submit any question to the Council when requested in writing by a member of the Council so to do, such member could " require " that his application together with the Governor's answer be recorded in the minutes of the Council.

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[1] 26 Geo. 5 & 1 Edw. 8, c. 2.

[2] S.I. 1936, No. 1031.

Although the Governor was obliged to seek the advice of the Executive Council, if he deemed it right to do so, the Royal Instructions provided that he was not required to act in accordance with the advice given to him by the members of the Council. If, however, he acted in opposition to the advice of the majority he had to report fully to His Majesty his reasons for so doing.

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[3] Royal Instructions dated March 3, 1937. These Instructions were altered by Additional Instructions dated July 2, 1940; November 23, 1944; July 17, 1948; November 4, 1958.

Subject to a reservation contained in section 14 of the Aden Colony Order, 1936 (which repeats the retention of power to His Majesty, His heirs and successors, with the advice of the Privy Council, to make laws for the peace, order and good government of the Colony, set out in subsection (2) of section 288 of the Government of India Act, 1935), the Governor, in the exercise of his legislative powers, and according to the terms of the Royal Instructions, could enact laws, to be known as Ordinances, on any subject. He could not, however, unless he had previously obtained instructions thereupon from the Secretary of State for the Colonies, or unless the Ordinance contained a clause suspending its operation until the signification of His Majesty's pleasure, assent to any Bills of the following classes:

"(a) any Bill for the divorce of married persons;

(b) any Bill whereby any grant of land or money or other donation or gratuity may be made to himself;

(c) any Bill affecting the currency of the Colony or relating to the issue of bank notes;

(d) any Bill establishing any banking association, or altering the constitution, powers or privileges of any such association;

(e) any Bill imposing differential duties;

(f) any Bill the provisions of which appear to him to be inconsistent with the obligations imposed upon Us by any treaty, convention or agreement with or other obligation towards or arrangement relating to any country or international or similar organisation outside the Colony;

(g) any Bill affecting the discipline or control of Our naval, military or air forces;

(h) any Bill of an extraordinary nature and importance whereby Our prerogative or the rights and property of Our subjects not residing in the Colony, or the trade or transport or communications of any part of Our dominions or any territory under Our protection in which We have for the time being jurisdiction, may be prejudiced;

(i) any Bill whereby persons of any racial or religious community may be subjected or made liable to disabilities or restrictions to which persons of other such communities are not subjected or made liable;

(j) any Bill containing provisions to which Our assent has once been refused or which have been disallowed by Us:

Provided that the Governor may, without such instructions as aforesaid and although the Bill contains no such clause as aforesaid, assent in Our name to any Bill falling within any of the classes described in this Clause (except such a Bill as is described in sub-paragraph (f) of this Clause) if he is satisfied that urgent necessity requires that the Bill be brought into immediate operation; but in any such case he shall forthwith transmit to Us the Bill to which he assents together with his reasons for so assenting." [4]

It was provided in the Royal Instructions of 1937 that Ordinances were to be enacted by the simple procedure of publication in Bill form for one calendar month and thereafter they were assented to by the Governor and became law.

It will be seen that apart from the need for consultation with an Executive Council (which until 1954 consisted, with one exception, of official members) the Governor, provided he complied with the Royal Instructions, was autonomous.

Direct administration by the Governor with no representative government continued until 1946 when the first constitutional step in the history of this Colony took place. Opportunities for constitutional advance had been limited by the World War which endured from 1939 until 1945 and it was not until October 24, 1946, that the Aden Colony (Amendment) Order, 1944,[5] was brought into force. This

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[4] This is the amended list of Bills which is contained in clause 16 of the Royal Instructions applying to the Colony of Aden (see Additional Instructions dated November 4, 1958).

[5] S.I. 1944, No. 1316.

Order provided for the establishment of a Legislative Council for the Colony. Power to make laws, which had formerly been vested in the Governor alone, was now vested in the Governor acting with the advice and consent of the Legislative Council.

That Council was composed of seventeen members. They were the Governor, as President, four *ex officio* members, being the Senior Officer for the time being in and stationed in the Colony in command of His Majesty's Regular Forces in Aden and the persons for the time being lawfully discharging the function of Chief Secretary, Attorney-General and Financial Secretary; four official and eight unofficial members, all of whom were nominated by the Governor in pursuance of His Majesty's instructions issued through the Secretary of State for the Colonies. Official members were selected from senior government officials such as the Director of Medical Services, the Director of Education, the Postmaster-General, the Director of Public Works and others; the unofficial members were selected from residents of Aden not holding any office or emolument under the Crown in the Colony. This Council, in which trial steps in representative government were to be taken and in the composition of which there had accordingly to be safeguards, contained an official majority (it should be noted in passing that the Governor had not only an original but also a casting vote) and all the unofficial members were nominees of the Governor.

The next step in constitutional development introduced an elected element into the Council.[6] By the Aden Colony (Amendment) Order in Council, 1955,[7] the Legislative Council was reconstituted to consist of the Governor as President, the same four *ex officio* members who had been members of the former Legislative Council, four nominated official members, five nominated unofficial members (nominated as before by the Governor) and four elected members. Three of these each represented one of the electoral districts into which the Colony was divided and were elected by the votes of those persons entitled to be placed on the register of electors for each district.[8] The fourth elected member represented and was elected by the Council of the Aden Municipality from amongst its members.

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[6] A formal minor alteration was made to the 1944 Order by the Aden Colony (Amendment) Order, 1947 (S.I. 1947, No. 2778).

[7] S.I. 1955, No. 1654. This had been preceded a few weeks before by an Aden Colony (Electoral Provisions) Order in Council, 1955 (S.I. 1955, No. 1396), to enable legislation to be enacted in the Colony for the holding of elections of members of the Legislative Council.

Although this revision of the composition of the Legislative Council introduced into it an elected element, there was still an official majority in both the Legislative and the Executive Councils, the latter of which the Governor was still obliged to consult in the circumstances to which reference has already been made. In 1955, however, an Arab unofficial member (in addition to the European unofficial member already serving) was appointed to the Executive Council. This, and subsequent alterations in the composition of the Council, was able to be effected without any variation of the constitutional instruments since clause 4 of the Royal Instructions enabled " . . . such other persons as may from time to time be appointed by Us . . . " to be members of the Council. At the beginning of 1957 yet another Arab unofficial member was appointed to the Executive Council.

In 1958 the next and most recent constitutional advance in the history of the Colony of Aden was made.[9] On November 18, 1958, the Aden Colony (Amendment) Order, 1958,[10] came into force. The most important feature of this constitutional document was that it provided for an elected majority in the Legislative Council. Briefly this extensive amending order fundamentally recast the composition of the Legislative Council so that—

(i) the Governor was no longer a member of the Council.

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[8] Qualifications for voters and candidates for election were similar. See s. 7B of S.I. 1955, No. 1654.

[9] In 1956 an additional section, 24A, had been added to the revised Order in Council to provide for the appointment of a substantive Governor or Judge of the Supreme Court to hold office while his predecessor was on leave prior to retirement. See Aden Colony (Amendment) Order, 1956 (S.I. 1956, No. 996).

[10] S.I. 1958, No. 1747.

It was presided over by a Speaker, who had no vote, appointed by the Governor;

(ii) the council consisted of—

(a) twelve elected members, elected to represent five electoral divisions. The distribution of the twelve members among the electoral divisions (the names and boundaries of which and the number of members to be returned by each was specified by the Governor in Council) was—

Crater North	3 members
Crater South	3 members
Maalla and Khormaksar	2 members
Tawahi	2 members
Sheikh Othman and Little Aden	2 members

(b) five *ex officio* members, being a senior officer on the staff of the Air Officer Commanding the British Forces in the Arabian Peninsula, and (as in all previous Legislative Councils) the persons for the time being lawfully discharging the functions of Chief Secretary, Attorney-General and Financial Secretary; and

(c) one other government official and six other members (known as nominated members) nominated by the Governor.

The persons entitled to vote at elections of members of the Legislative Council were to be male persons of not less than twenty-one years of age who—

(a) (i) were British subjects born in the Colony, or

(ii) if not born in the Colony, were British subjects or British protected persons who had resided in the Colony for a period of not less than two years out of the three years immediately preceding the date of application for registration as an elector; and

(b) (i) were owners of immoveable property, within the Colony of a value of not less than one thousand five hundred shillings; or

(ii) had been for not less than twelve months out of the twenty-four months immediately preceding the date of application for registration as an elector in occupation of residential or business premises in the Colony of an annual value of not less than two hundred and fifty shillings; or

(iii) had been in receipt of an average monthly income of not less than one hundred and fifty shillings during the twelve months immediately preceding the date of application for registration as an elector.

Persons were, however, disqualified from voting if (in other respects qualified to vote) they had given their allegiance to a foreign state, were insane or had been convicted of an election or certain other specified offences.

Qualifications and disqualifications applying to candidates for election were in principle similar to those for voters except that in the case of a candidate the residential qualification of any person who was a British subject not born in the Colony or a British protected person was seven out of the ten years immediately preceding the date of his nomination for election as compared, in the case of an elector, with two out of the three years immediately preceding his application for registration as a voter.

In addition an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in any part of Her Majesty's Dominions, was disqualified from being elected or nominated as a member to the Legislative Council.

To be nominated as a member of the Council a person had to be twenty-one years of age and not subject to any of the disqualifications which applied to electors or elected members.

Although there is in this new Legislative Council, which was constituted in January 1959 and has a life of four years, an official majority, provisions in the Aden Colony (Amendment) Order in Council, 1958, vest reserve powers in the Governor, regulate the introduction of Bills and motions into the Council, safeguard Her Majesty's interests in the Colony and ensure responsible government. In addition, of course, no Bill can become law until Her Majesty's assent has been given thereto and this cannot be considered as automatic.[11]

The Governor, if he considers it expedient in the interests of public order, public faith or good government (which include the responsibility of the Colony as a territory within the British Commonwealth of Nations, and all matters pertaining to the creation or abolition of any public office or to the appointment, salary or other conditions of service of any public officer) that any Bill introduced into or any motion proposed in the Legislative Council should have effect can, if the Council fail to pass such Bill or motion within such time and in such form as the Governor may think reasonable and expedient, declare (subject to reporting to the Secretary of State for the Colonies, who has power to revoke any declaration made by the Governor) that such Bill or motion shall have effect as if it had been passed or carried by the Council.[12] No Bill or motion which, in the opinion of the Speaker makes provision for imposing or increasing any tax or charge on the revenue or other funds of the Colony or which alters, conforms, or remits any charge or debt or which would alter the emoluments or terminal benefits to a public officer, can be proceeded with in the Council unless the prior approval of the Governor has been obtained.[13]

The far-reaching revision of the composition and powers of the Legislative Council which was introduced at the beginning of 1959 was matched by a correspondingly important development in the structure of the executive side of the government of the Colony. The progressive addition of unofficial Arab members to the Executive Council has already been mentioned, and in 1958 that Council consisted of three *ex officio* and three nominated members, in addition to the Governor who presided. Since the elected representatives of the people of the Colony were to have a majority in the new Legislative Council it was consistent with the progressive policy of equipping the local people to undertake the administration of their country that at this stage of constitutional development they should assume an increasing responsibility in the executive government of the Colony. Accordingly, provision was included in the Additional Instructions of November 4, 1958, for the Governor to select five persons, who were elected members or nominated members of the Legislative Council (not less than three of whom had to be elected members), to be Members in Charge of Departments of the Government and these five persons were also to be appointed to the Executive Council. The first five Members in Charge were made responsible for the services included in the departments of (i) education, (ii) public works, (iii) communications, (iv) labour and social welfare, and (v) medical, and their functions and responsibilities included—

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[11] s. 17 of the Aden Colony (Amendment) Order, 1958 (S.I. 1958, No. 1747).
[12] s. 16A of the Aden Colony (Amendment) Order, 1958 (S.I. 1958, No. 1747).
[13] s. 22 of the Aden Colony (Amendment) Order, 1958 (S.I. 1958, No. 1747).

(a) responsibility in the Legislative Council for replying to questions relating to departmental subjects and services; the sponsoring of legislation on departmental matters and the general conduct of departmental business in the Legislative Council;

(b) the formulation of departmental policy; and

(c) responsibility for ensuring that the decisions and policies approved by the Governor in Council, in so far as they affected the departments of Members in Charge, were carried into effect.

The Executive Council, which still requires to be consulted by the Governor (in the matters and circumstances to which reference has been made) when he is formulating the policy of the government of the Colony, consists of the Governor, as President, the five *ex officio* members of the Legislative Council and the five Members in Charge of departments.[14]

J. V. M. SHIELDS.

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[14] Clause 4 of the Additional Instructions dated November 4, 1958.

THE REPUBLIC OF CHINA IN THE UNITED NATIONS

FOR more than ten years the United Nations has been occupied with the problem of China's representation in its various organs. The Charter of the organisation does not contain specific provisions for a case where two rival governments claim the legal right to represent a state which is an original member of the United Nations; nor does the law of the United Nations empower one of its organs to review with legal validity the constitutionality of decisions of other organs and to co-ordinate their actions.

By now it seems perfectly clear that the diverse interpretations concerning the right to representation of the Chinese rival governments in the United Nations, which the opposing groups allege to be based on rules of international law, are quite often inspired by considerations of political expediency not necessarily in conformity with the law of nations. However, the increasing reliance on power politics should not becloud the time-honoured fact that no adequate substitute exists which could replace law as the most important normative element for the peaceful ordering of society. In the following, an attempt is made, therefore, to summarise and evaluate some of the more frequently used approaches, made since November 1949 in the Security Council, the General Assembly, and other organs of the United Nations, with regard to the representation of the Republic of China in the United Nations.

It is necessary to differentiate between the *de jure* recognition of a new state, which carries automatically the recognition of the government acting on behalf of such a new member of the community of nations, and the recognition of an old state which, either because of its long historical existence, is an original member of the international community or which, although born at a later date, has been granted recognition as an international person by the governments of previously existing states. In these latter two cases, concerning states with *de jure* existence, the mere fact that succeeding governments of such old states are either recognised or not recognised by other governments does not affect the *de jure* status of these states as international persons.

China is an original member of the community of nations, and its *de jure* existence as a state, therefore, is firmly established under international law. However, it has been asserted that the People's Republic of China is a new state born out of a Communist revolution and, even in name, not identical with the Republic of China. The argument, therefore, has been advanced that the former's repeated requests for representation in the United Nations could not be considered without previous admission of the People's Republic to membership in accordance with Article 4 of the Charter. The maintenance, in its varying versions, of what might be called the admission theory has the effect of barring the People's Republic of China from membership in the United Nations even if the required two-thirds majority vote for " admission " could be obtained in the General Assembly since, under prevailing political conditions, the necessary decision of the Security Council to recommend such admission could not be made against the vote of any of its permanent members, which includes the representative of the Chinese rival government.

It is a well-established principle of international law that a change in the headship, or the government, or the territory of a state, even if achieved by a revolution, does not affect its legal identity. Moreover, the practice of governments, particularly frequent since World War II, does not support the assertion that a change in the name of an old state terminates its legal existence. It cannot be doubted that the principle of national sovereignty confers upon any government the right to change the name of a state over which it exercises exclusive domestic jurisdiction. It is noteworthy in this connection that the annual official roster of the United Nations dates the membership of China back to October 24, 1945, and lists the total area of this country as 9,736,288 square kilometres, thus demonstrating also the historical-geographical identity of the old Republic of China with the territory, except for Formosa and some surrounding islands, now named the People's Republic of China. It appears, therefore, that the repeated claims made by the government of the People's Republic for representation in the United Nations cannot be rejected on legal grounds by asserting that the People's Republic of China is a new state, or that its government assumed power by resort to revolutionary methods, or that the change in the name of this state has terminated the legal identity with that state previously designated as the Republic of China and accepted as an original member of the United Nations with a permanent seat in the Security Council in accordance with Article 23 of the Charter. If it is correct to reject as legally untenable the assertion that the People's Republic of China is a new state, which would be required to make formal application for membership in the United Nations, the claims made frequently in the organisation that Communist China must not be admitted to membership in the United Nations unless it proves to be a peace-loving state, willing and able to carry out the obligations contained in the Charter, have no legal significance since Article 4 of the Charter does not refer to states which are already members of the United Nations but only to states applying for membership in the organisation.

It would appear that the same legal reasoning entitles the Nationalist government at Formosa, officially to designate the area over which it exercises exclusive jurisdiction as a new state, albeit with an old name, *i.e.*, The Republic of China. This unusual designation may be explained in part by the historical fact that the Formosa government could also claim to have been the constitutional government *in exile* of the former, the old Republic of China, as long as actual fighting of the opposing armies continued on the Chinese mainland. Such a claim, however, has lost its legal validity with regard to this vast area for quite some time.

It is necessary, therefore, to consider the Republic of China as a new state, established by secession as a result of civil war during which the previously recognised old state, now called the People's Republic of China, has lost effective control over the area and population now under the permanent jurisdiction of the government of this new state. It should be noted, in this connection, that the repeated statements of the government of the People's Republic of China, claiming as an integral part of this state also the territory now under the exclusive control of the Nationalist government and declaring that these areas will be liberated, if necessary by force, do not only deny the validity of a *de facto* situation—namely the legal existence of the Republic of China—but are apt to endanger the maintenance of international peace and security. It may be assumed that representation of the People's Republic of China in the United Nations and full discussion of this politically dangerous and legally untenable claim against the Republic of China, in accordance with Article 35, section 2 of the Charter, would impose upon the government of the People's Republic of China certain restraints and international obligations which it may not be prepared to assume and to observe outside the United Nations.

The question also arises whether a new state, previously forming part of the territory of an original member state of the United Nations, is automatically entitled, as a limited successor, to membership in the organisation. If the case of Pakistan is to serve as a precedent, the ruling of the General Assembly should apply, that " when a new State is created, whatever may be the territory and the population which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter."

The international status of the Republic of China has been obscured and confused not only by the fact that the government of this new state chose to give it a name identical with that in existence for the entire area of China before the secession of Formosa and its surrounding islands, and asserting to be the old state's legitimate successor government, but also because the discussions of the Chinese problem in the United Nations and elsewhere have frequently linked together two similar though legally quite different terms, namely recognition and representation. Although renowned jurists, such as Professor Lauterpacht, believe that " a government which enjoys the habitual obedience of the bulk of the population with a reasonable expectancy of permanence, can be said to represent the state in question and as such to be entitled to recognition," the practice of many leading states certainly does not conform with this theoretically very desirable argument since the governments of certain states, such as the United Kingdom, other Commonwealth nations, and all Communist *bloc* countries, recognise the government of the People's Republic, while many others, under the leadership of the United States, maintain diplomatic relations only with the Formosa government of the Republic of China. This wide deviation in the practice of states also proves that the recognition or non-recognition of a government by that of a third state cannot be used as an internationally valid, legal criterion for the establishment of a claim to representation in the United Nations; nor does the practice of this organisation indicate that membership of a state in the United Nations and, as a consequence, the representation of its government in various organs of this organisation, would impose upon other members a legal obligation individually to recognise the government of such a state. In addition to the Chinese precedent, numerous other examples, such as those of Israel and Spain, support this interpretation. Regardless of which of the two Chinese governments is considered by a third state as the government of the " Republic of China " in the sense of Article 23 of the Charter, the United Nations cannot decide the claims to representation in this body made by the Chinese rival governments on the basis of their recognition or non-recognition by individual states, members of the organisation.

Among the many approaches used in the United Nations concerning the representation of the Republic of China, two broad patterns are readily discernible. During the first years of the debates, the final decisions of the Security Council and the General Assembly, followed by other organs of the United Nations, were rendered on the basis of their respective rules of procedure with regard to the verification and admission of the credentials issued to the various delegates of member states by their governments.

The Security Council, sitting as a credentials committee and using the voting procedure stipulated in Article 27 of the Charter, has been unable to reach an affirmative decision on the objections, raised by some members under rule 17 of its rules of procedure, as to the validity of the credentials issued by the Formosa government of the Republic of China and, therefore, continues to seat its delegate. The interpretation of the provisions with regard to " representation and credentials," particularly rules 14, 15 and 16, has also prevented the representation on the Security Council of the People's Republic of China.

During its early debates, the General Assembly followed the procedural pattern of the Security Council by continuing to accept as valid the credentials of the delegates appointed by the Formosa government as the representatives of that " Republic of China " which, at the time it became an original member of the United Nations, did claim effective control over the entire territory and the population of this state. Conversely, the General Assembly rejected the recurring objections made on behalf of the People's Republic of China to the credentials of the representatives of the " so-called Kuomintang Government," primarily by invoking rule 29 of its rules of procedure. However, a new pattern in the approach to the problem of Chinese representation was inaugurated when the General Assembly confirmed on November 13, 1951, a draft resolution—introduced by the representative of Thailand — which previously had been accepted by the General Committee of the General Assembly on November 10, 1951, to " postpone consideration, for the duration of the sixth session, of any further proposals to exclude representatives of the National Government of China from the Assembly or to seat representatives of the Central People's Government of the People's Republic of China to represent China in the Assembly." The practice not to permit for inclusion on its agenda the matter of Chinese representation and to accept, at the beginning of each subsequent session, the findings of the credentials committee, that the governments of all member states represented had submitted satisfactory credentials, has since been maintained in the General Assembly. Usually on the motion of the United States delegate, the resolution not to put the question of Chinese representation on the agenda of the General Assembly, which, in effect, postpones a substantive decision of this problem, has been justified—and carried—on the ground " that it would be unwise to vote on an issue on which the Assembly was so deeply and so evidently divided."

The practice of the General Assembly has been followed by all other organs of the United Nations whenever the question was raised.

Since each organ of the United Nations enjoys full autonomy in the interpretation of the Charter, the evasion of a positive solution pertaining to the problem of Chinese representation by voting not to discuss it as an item on the agenda will remain legally unassailable as long as the required majority vote in the General Assembly and other organs of the United Nations will favour these self-imposed restrictions.

It is possible to assume that political developments in certain major countries directly concerned with the Chinese problem will favour, in the not too distant future, a return to a greater emphasis on positive international law. Should such a development take place, it would seem important to stress the fact that the validity of the effectivity rule as a fundamental norm of international law cannot be doubted if one is prepared to accept international law as law—albeit in its primitive stages—and not as a shining edifice of morality built on the shifting sands of the subjective interpretations and varying aspirations of national governments. As stated by a leading expert, Professor Kelsen, the principle of effectiveness prevails under general international law to a much greater extent than under the highly centralised national legal orders; and the application of this principle is demonstrated by the fact that " an actually established authority is the legitimate government of a state, the coercive order enacted by this government is the legal order, a valid legal order, and the community constituted by this order is a state in the sense of international law, in so far as this order is, by and large, effective."

It should be perfectly clear that, as a corporate body, the United Nations cannot apply the municipal laws, policies and greatly differing interpretations of its member states with regard to the representation of China in the United Nations. As a juristic person created by treaty law, the United Nations can only apply the stipulations of the Charter and, in the absence of an applicable norm contained in the Charter, the organs of this international organisation ought to be guided by the prevailing norms of general international law. The claims of the two rival governments can be decided by the United Nations on a legal basis by invoking the effectivity rule which, in theory at least, has been accepted as valid by all states. A request in accordance with Article 96 of the Charter that the International Court of Justice render an advisory opinion in the matter of Chinese representation would facilitate the chances for agreement in the United Nations since, according to past precedent, one may expect compliance with the court's interpretation of the law. If the International Court of Justice should rule in conformity with the principle of effectivity, the credentials committee of the General Assembly would then be in a stronger position to decide that the credentials of those Chinese delegates are valid whose state is a legitimate member of the United Nations, whose government is legally entitled to act on behalf of that state, and, therefore, is authorised to issue such credentials. The report of the credentials committee, if previous practice is to be followed, should encounter little difficulty in being adopted by a decision of the General Assembly which, in turn, should be acceptable to all other, less representative organs of the United Nations. Accordingly, it should be possible to pass a resolution in the General Assembly, based on the report of its credentials committee and the court's advisory opinion, to the effect that the government which, with a degree of permanency, exercises effective control over all or nearly all the territory of the state, as well as over the population residing therein, originally designated as the Republic of China in the Charter of the United Nations and its roster of membership, is legally entitled to act as the legitimate government of this state and to be represented in the organs of the United Nations. The same principle of effectivity would deny to the government of the People's Republic of China the legal right to jurisdictional claims over the Republic of China since the latter is a newly-constituted state with a government in effective control of its territory and population.

One may expect that this procedure, particularly if given careful diplomatic preparation and strong legal support, will greatly help in bringing about a lessening of international tensions, especially in the Far East, without necessarily carrying a serious loss of political prestige to those governments presently opposed to the representation of the People's Republic of China in the United Nations. It would seem that international lawyers and statesmen, particularly from among the Commonwealth nations, could make an important contribution towards a settlement of the Chinese question of representation on the basis of positive international law.

The proposals contained in this paper are based on a legal analysis of the present *de facto* situation. They do not advocate, as a *final* settlement, a so-called " two Chinas solution," particularly since such a possibility has been rejected by both rival Chinese governments as well as by some other powers, including the United States and the Soviet Union. It may not be unrealistic, however, to express the hope that the parties directly concerned—by acknowledging international law rather than power politics as the ordering element in their mutual relations—might be prepared, at a propitious moment, to accept as valid a positive legal approach as the basis for the conclusion of a regional agreement to submit any dispute or matter likely to lead to international friction to pacific settlement or adjustment in accordance with the rules of general international law, and especially those provided by Chapter VI of the United Nations Charter. A non-aggression agreement for the entire Pacific region could create international organs endowed with limited jurisdictional rights for the purpose of facilitating the implementation of such a treaty and might pave the way for a more constructive use of Article 1, section 3 of the Charter, particularly a more intensified regional co-operation " in solving international problems of an economic, social, cultural, or humanitarian character. . . ." The precedent of confederations created for specific purposes is well established in international law. The members of a confederacy, as is here proposed, could eventually decide whether to follow the historical pattern by turning into one or more federal states or whether to regain freedom of action by terminating the treaty of regional confederation. The consideration of this legal avenue could, perhaps, be useful as a starting point for international negotiations and, therefore, a first step towards a gradual solution of the present political impasse. The effectuation of this proposal *de lege ferenda* presupposes that the Formosa government of the Republic of China can be converted—in the not too distant future—to permit a two-party, or a multi-party system, and that the government of the People's Republic of China will be prepared to accept in good faith the continued existence of a pluralistic international structure such as is exemplified by the Charter of the United Nations.

F. B. SCHICK.

CASES AND COMMENT

1. SCOTTISH CASES

PRIVATE PROSECUTION —Alleged obscene book

McBain v. *C.*, 1961 S.L.T. 209, is more noteworthy for its facts and "human interest" than for any point of law. McBain sought to initiate a private prosecution of a Glasgow bookseller for having exposed for sale *Lady Chatterley's Lover*, a book alleged to be impure and obscene and likely to corrupt the morals of the young. The Lord Advocate had declined to institute a public prosecution, and refused his concurrence to McBain's proposed prosecution; McBain therefore presented a Bill for Criminal Letters to the High Court asking the court to request the Lord Advocate to give his concurrence or to require him to concur.

The court refused the Bill; in the first place it was observed that the court could not examine the reasons which prompted the Lord Advocate's decision not to prosecute, nor to concur in private prosecution. Secondly, though the court could permit a private prosecutor to prosecute without the Lord Advocate's concurrence, the individual complainer had to be able to show some substantial and peculiar interest in the issue of the trial, arising out of some injury which he, beyond others, had suffered, and at which he was entitled to feel more than the ordinary indignation which ordinary citizens felt. This peculiar interest was present in the last case in which the court permitted private prosecution without the Lord Advocate's concurrence, *J. & P. Coats* v. *Brown*, 1909 S.C.(J.) 29; 1909, 1 S.L.T. 432, where the complainers alleged that they had been defrauded. But in the present case the wrong, if any, had been done equally to a large and indefinite number of people. There is nothing novel in the judgments apart, possibly, from emphasis on the fact that in such an application it is not for the court to review the sufficiency of the Lord Advocate's reasons for not prosecuting but merely to consider whether, in the light of the facts alleged in the Bill, the court's permission should be granted notwithstanding the Lord

Advocate's refusal. On the facts it is quite apparent that the complainer had no more interest to institute a prosecution than many other persons concerned with the moral welfare of the young. In any event it seems very doubtful if the prosecution would have been successful or would have achieved anything.

D. M. W.

ARBITRATION —Circumventing statutory procedure

Forsyth-Grant v. *Salmon*, 1961 S.L.T. 262, was an attempt to circumvent the statutory requirements of the Agricultural Holdings Acts which provide for arbitration to decide issues between landlord and tenant. A landlord and his tenant took to arbitration an issue of rent. The arbiter issued proposed findings and the landlord requested him, as he was entitled to do, to state a case for the sheriff, specifying certain questions of law which he wished to have included in the stated case. The parties were unable to agree on the terms of the stated case, and the arbiter stated it himself. The landlord then brought an action in the sheriff court to ordain the arbiter to state a case upon certain specified questions of law and, when the sheriff dismissed the action as incompetent, appealed to the Court of Session which held that, even if the appeal to the Court of Session was competent (and Lord Mackintosh expressed the view that it was not, while no judge accepted that it was), the action was incompetent. It was an attempt to get round the normal arbitration procedure, and widen the scope of the arbitration. " The actual statement of the case is the arbiter's affair. The parties cannot dictate or compel either the form of the findings in fact or the form of the questions in law." The only legitimate means of influencing the arbiter are by persuasion at adjournment of the stated case or by persuading the sheriff to remit to the arbiter to expand the case as stated by him.

To have countenanced this action would have made enormous inroads on the whole scheme of the Agricultural Holdings Acts, which provide for arbitration with a limited appeal on law by way of a stated case to the sheriff. This pattern of procedure is intended to cut out exactly what the landlord resorted to here, an action and appeal, and the landlord's attempt was rightly rejected.

D. M. W.

REPAYMENT—Money paid in error

British Hydro-Carbon Chemicals, Ltd., and *British Transport Commission*, 1961 S.L.T. 280, is a specimen of that *rara avis*, a petition for summary trial of questions arising under commercial agreements. One of the questions in issue was whether money paid by mistake was recoverable when the mistake had been one common to both parties as to the construction to be put on the terms of a contract between them. Lord Kilbrandon, whose decision under the summary trial procedure is unappealable and therefore possibly entitled to greater weight than an ordinary first-instance decision, held that the money was recoverable. This resolves a persisting doubt in the law in, it is submitted, the right way. The position now is that *condictio indebiti* lies for money paid under error of fact, and also for money paid under error of law, where the error has been on a matter of law as between the parties; but not for money paid under error as to the general law of the land, as, for instance, under an erroneous interpretation of a public general statute: *Glasgow Corporation* v. *Lord Advocate*, 1959 S.C. 203; 1959 S.L.T. 230. Lord Kilbrandon rested his decision fundamentally on the equitable nature of the plea of *condictio indebiti*, " which calls for repetition of a sum of money received by a person albeit bona fide, in consequence of the innocent mistake of himself and of a payer who was not his debtor in that sum," and goes on to point out that, where the innocent mistake is a mistake as to the general law, there may be public considerations which must supersede that natural equity of repetition. The one case of " public considerations " recognised to date has been the case of payments under a mistaken interpretation of a public general statute, particularly a taxing Act, where it would be very inconvenient if possibly many cases had to be reopened, possibly going back many years, because of a judicial interpretation contrary to what had been commonly assumed to be the true interpretation. The recognition in the present case that there is a distinction among cases of error of law between error on a public matter and error on a matter private to the parties, such as a contract or will, is important and the refusal of recovery must be confined to cases where parties other than the parties to the case before the court might also be affected by the decision. It goes much too far to say that recovery is not permitted for error in law, as the House of Lords did over a century ago. **D. M. W.**

DIVORCE—Desertion—resumption of cohabitation

Grant v. *Grant*, 1961 S.L.T. 322, turns on the interpretation of conduct by the pursuer in a divorce action. The wife deserted her husband in April 1956 and remained apart till April 1959. The husband went to New Zealand in 1958 but about April 1959 the wife wrote to the husband indicating willingness to resume cohabitation, and she travelled out, arriving in New Zealand in October 1959, and lived in his house there till March 1960 when she again left. By arrangement the parties had occupied separate rooms during this period and sexual relations had not been resumed. In these circumstances Lord Wheatley dismissed the husband's action for divorce on the ground that he was barred by *mora* and acquiescence. The defender, it was held, had genuinely desired to resume cohabitation. The condition that they should not resume sexual relations at once was reasonable and the absence of intercourse does not, in any event, constitute desertion. There had accordingly been a voluntary resumption of cohabitation for a substantial period and the husband could not found on the wife's prior desertion.

The question which has most commonly arisen in such cases has been the effect of a single act of intercourse as terminating a period of desertion, rather than the effect of a reasonably prolonged resumption of cohabitation without resumption of sexual relations. In view of the length of time the inference of resumption of married life, and consequent termination of desertion, seems clearly justifiable, though a shorter period might have posed a narrow question.

D. M. W.

ALIMENTARY LIFERENT—Whether renounceable

A narrow difference of judicial opinion can be discerned in *Douglas-Hamilton* v. *Duke and Duchess of Hamilton's Ante-Nuptial Marriage Contract Trustees*, 1961 S.L.T. 305. In an ante-nuptial marriage contract entered into by the Duke and Duchess of Hamilton provision was made for payment to the Duchess, provided she survived the Duke, of an annuity for her liferent use allenarly. Certain assets were transferred to the marriage contract trustees to enable them to implement these trust purposes. The Duchess had now executed a deed of renunciation, renouncing all the provisions in her favour, including the alimentary liferent annuity, and she and the Duke then sought to appoint the shares released thereby to one of the children of the marriage, as the survivor would have been entitled to do, with effect from the end of the liferent. The trustees contended that the Duchess had not competently renounced, and indeed could not renounce, the alimentary annuity to which she would be entitled on being widowed. In the Outer House Lord Guest accepted their contention and held that the alimentary liferent could not be renounced (1961 S.L.T. 212). On a reclaiming motion a contrary view was taken by the Lord President and Lord Carmont, Lord Guthrie dissenting. The Lord President pointed out that the Duchess was seeking to renounce a benefit which she was not presently enjoying and might never enjoy, a purely contingent benefit, and also that she was not trying to convert the benefit into an unrestricted benefit or any other kind of benefit. " She is repudiating the contingent gift before she has any right to enjoy it." She could not have repudiated the gift once she became entitled to enjoy it. The dissenting judge, Lord Guthrie, who agreed with Lord Guest in the Outer House, regarded as the fundamental matter the constitution of the trust to protect the alimentary interest, since this had placed the funds beyond the control of the spouses. This is true, but the purpose of putting the funds beyond the control of the spouses is surely not to render the arrangements unalterable before they come into operation, but to protect the capital from which the wife's liferent will be drawn from her husband and her creditors. If the liferent had not been declared alimentary, it would have been renounceable: *Beith's Trs.* v. *Beith*, 1950 S.C. 66; 1950 S.L.T. 70. The qualifications on this decision are important, namely, that the beneficiary must not yet have begun enjoyment of her alimentary liferent, and that there must be no attempt to substitute something for the alimentary liferent. It is implicit also that the renunciation was freely and voluntarily made, and that there was no coercion or undue influence. Subject to these qualifications the decision that, particularly in these times of changing economic conditions, a merely prospective liferent interest can be renounced, even though declared alimentary, seems both reasonable and not in conflict with the authorities.

D. M. W.

2. ENGLISH CASES

NUISANCE—Atmospheric pollution and noise

In *Halsey* v. *Esso Petroleum Co., Ltd.* [1961] 1 W.L.R. 683 the plaintiff was successful in obtaining damages against the Esso Petroleum Company for emitting noxious dust, smuts, smell and noise from their oil storage and issuing depot near his house. An injunction was only refused because the boiler house was about to be pulled down. Veale J. had some interesting observations to make on the quality of interference required to constitute a nuisance. Thus the defendants were liable for damage to the plaintiff's washing and motor-car caused by acid smuts. He also held that the noise from boilers and vehicles at night was an actionable nuisance. Night was the time when the ordinary man took his rest and the noise was an inconvenience materially interfering with ordinary physical comfort according to the plain and simple standards of ordinary and reasonable persons living in the plaintiff's district. Despite *Watt* v. *Jamieson*, 1954 S.C. 56; 1954 S.L.T. 56, there is a dearth of modern Scottish authority as to what in fact constitutes a nuisance. *Halsey* provides a useful list of English authorities which may be taken as some guide although it is probable that Scots law does not regard an isolated occurrence as a nuisance.

W. A. E.

PASSING OFF—use of name "champagne"

In *J. Bollinger and Others* v. *Costa Brava Wine Co., Ltd.* [1961] 1 W.L.R. 277 the plaintiffs, who were producers of wine in the champagne district of France, were successful in obtaining an injunction against the defendants, who produced a similar sparkling wine which they marketed in the United Kingdom under the name of "Spanish champagne." They also freely distributed their brochure here entitled "giving a champagne party." It was held by Danckwerts J. that the evidence established that "champagne" in the United Kingdom meant the wine produced in the champagne district of France by the plaintiffs and had never come to mean a type of wine and that a substantial portion of the public were therefore likely to be misled by the description of the defendant's wine as "Spanish champagne." The issue of the brochure was also described as a deliberate case of passing off which entitled the plaintiffs to the injunction sought.

W. A. E.

COMPULSORY PURCHASE ORDER—ultra vires

The powers of the courts to reduce Ministerial decisions is illustrated in *London and Westcliff Properties, Ltd.* v. *Minister of Housing and Local Government* [1961] 1 W.L.R. 519 where the court quashed a compulsory purchase order which involved the local council concerned in a clear contravention of section 47 (2) of the Housing Act, 1957. The error involved appeared on the face of the Inspector's report and the relevant time for considering whether a compulsory purchase order was *ultra vires* extended up to the moment when it was confirmed by the Minister. The invalidity had occurred before confirmation because the local council had by then made it plain (as narrated by the Inspector) that it proposed to use the land to be acquired in a way which contravened the provisions of the Act. In these circumstances Ashworth J. held that the court was entitled to intervene.

W. A. E.

DANGEROUS DRIVING—mechanical defect in car

In *R.* v. *Spurge* [1961] 3 W.L.R. 23 the appellant's appeal against a conviction of dangerous driving was refused. His defence at the trial was that a vigorous application of his brakes pulled his car on to the wrong side of the road causing it to collide with an oncoming vehicle. He, however, knew that his car had a tendency to pull to its off-side when the brakes were applied. The Court of Criminal Appeal in these circumstances held that it was dangerous for the driver to have driven his car with the knowledge he possessed and that therefore his defence to the charge of dangerous driving was not made out and he was rightly convicted.

W. A. E.

3. PRIVY COUNCIL CASES

BARRISTER: Professional misconduct: Disciplinary power of judge

Attorney-General of the Gambia v. *Pierre Sarr N'Jie* ([1961] 2 W.L.R. 845) was an appeal by special leave from the West African Court of Appeal. The respondent was a member of the English Bar who had been admitted to practice as a barrister and solicitor of the Supreme Court of the Gambia. The Chief Justice of the Gambia, in the course of a judgment in a civil suit, criticised severely certain conduct of the respondent which had come to his notice during the trial, and he sent a copy of his judgment to the Attorney-General of the Gambia who served a notice of motion on the respondent asking for an inquiry to be made by the Chief Justice into allegations of professional misconduct against the respondent and for his name to be struck off the roll of court. When the motion came before the Chief Justice the respondent consented to an inquiry being held but asked that it should be by someone other than the Chief Justice, who agreed to that being done in view of his findings in the civil suit. The Governor appointed a deputy judge to hold the inquiry.

By section 7 of the Supreme Court Ordinance of the Gambia: "1 (1) . . . it shall be lawful for the Governor to appoint a deputy judge to represent the Judge of the Supreme Court of the Colony of the Gambia [the Chief Justice] in the exercise of his judicial powers . . . ." "(2) Such deputy judge shall exercise all the judicial powers of the Judge of the Supreme Court, and all acts done by such deputy judge, in the execution of his powers, shall be as valid and effectual . . . as if they had been done by the Judge of the Supreme Court, . . ." By Order IX, rule 7, of the Rules of the Supreme Court of the Gambia: "The judge shall have power, for reasonable cause, to suspend any barrister or solicitor from practising within the jurisdiction of the court . . . or order his name to be struck off the roll of court." The deputy judge found that the respondent was guilty of professional misconduct, ordered that his name be struck off the roll of barristers and solicitors of the Supreme Court of the Gambia, and directed that the making of the order be reported by the Attorney-General to the Masters of the Bench of the Inn of Court by which he had been called to the Bar. The West

African Court of Appeal set aside that order on the ground that a deputy judge had only jurisdiction to represent the Chief Justice "in the exercise of his judicial powers"; and they held that the power to strike a legal practitioner off the roll was not a judicial power. Against that decision the Attorney-General appealed.

The Board stated that the deputy judge could only represent the Chief Justice in the exercise of his judicial powers, and not in the exercise of his administrative powers. Some of the powers of the Chief Justice were clearly judicial powers, as when he sat in court to decide civil or criminal cases. Others were clearly administrative, as when he directed the times at which the offices of the court should be open, or when he appointed notaries public, or made rules of court. Into which of those categories was to be placed the power of the Chief Justice to suspend legal practitioners or to strike them off the roll? The power given by Order IX, rule 7, to suspend or strike off the roll was simply a restatement of the inherent power of the judge at common law and was *intra vires*. When the judges exercised the power they did not decide a suit between parties. There was no prosecutor as in a criminal case, nor any plaintiff as in a civil suit. The judges usually acted on their own initiative, *ex mero motu*, on information which had come to their notice, and they were under a duty to act judicially. When the judges of a colony struck off or suspended a legal practitioner he had always been at liberty to petition Her Majesty in Council to restore him. But he should give notice of his application to the judges to enable them to justify their order. That the judges were themselves always made respondents to such a petition was an implicit recognition that, when exercising that jurisdiction, they did not sit as a court of law but as a disciplinary authority. The legislature, when setting up the West African Court of Appeal, provided for appeals from the decisions of the Supreme Court in civil and criminal cases, and then, by a special section, 14, provided that: "An appeal shall lie to the Court of Appeal from any order of the judge suspending a barrister or solicitor of the Supreme Court from practice or striking his name off the roll and for the purposes of any such appeal any such order shall be deemed to be an order of the Supreme Court." That section, by which the present respondent appealed to the Court of Appeal, showed clearly enough that the legislature did not regard the decision of the judge in such a case as a decision of the Supreme Court but as a decision of the judge as a disciplinary authority.

It was on that account—that the judge, when exercising disciplinary powers, did not sit as a court—that the West African Court of Appeal concluded that it was not part of his " judicial powers " within section 7 of the Supreme Court Ordinance, and that it was therefore not within the competence of a deputy judge. But in the Ordinance the phrase was: " the judicial powers of the judge." And it appeared to the Board that in that context a judge exercised judicial powers not only when he was deciding suits between parties but also when he exercised disciplinary powers which were properly appurtenant to the office of a judge. Suppose, for instance, that a judge, finding that a legal practitioner had been guilty of professional misconduct in the course of a case, ordered him to pay the costs, as he undoubtedly had power to do. That would be an exercise of the judicial powers of the judge just as much as if he had committed him for contempt of court. Yet there was no difference in quality between the power to order him to pay costs and the power to suspend him or strike him off. If the judges of a colony did suspend a practitioner or struck him off, it was open to him to appeal to Her Majesty in Council. That necessarily imported that it was the exercise by the judges of a judicial power, for there was no right of appeal to the Board from the exercise of an administrative power.

A preliminary point had been taken for the respondent that the Attorney-General had no *locus standi* to petition for special leave to appeal. By section 31 of the West African (Appeal to Privy Council) Order in Council, 1949 : " Nothing in this Order contained shall be deemed to interfere with the right of His Majesty upon the humble petition of any person aggrieved by any judgment of the court to admit his appeal therefrom . . ." The words " person aggrieved " were of wide import and should not be subjected to a restrictive interpretation. They did not include a mere busybody interfering in things which did not concern him, but they did include a person who had a genuine grievance because an order had been made which prejudicially affected his interests. The Board thought that the Attorney-General had a sufficient interest for that purpose. In a colony he represented the Crown as guardian of the public interest. It was his duty to bring before the judge any misconduct of a barrister or solicitor which was of sufficient gravity to warrant disciplinary action. If the judge acquitted the practitioner no appeal was open to the Attorney-General. He had done his duty and was not aggrieved. But if the judge found the practitioner guilty of professional misconduct, and a Court of Appeal reversed the decision on a ground which went to the jurisdiction of the judge, or was otherwise a point in which the public interest was concerned, the Attorney-General was a " person aggrieved " by the decision and could properly petition Her Majesty for special leave to appeal. Accordingly the preliminary objection failed.

By section 5 of the West African (Appeal to Privy Council) Order in Council, 1949: " Applications to the court for leave to appeal shall be made by motion or petition within twenty-one days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application." The West African Court of Appeal, in refusing the Attorney-General's application, said: " We cannot in face of section 5 of the Order in Council entertain an application for leave to appeal unless the notice to the opposite party of the intended application is given before the twenty-one days have expired." The Attorney-General lodged his notice of motion within twenty-one days but did not serve it within that time on the respondent because the latter was not in the Gambia but in England. The Board stated that the ruling of the Court of Appeal was of no practical significance in the present case as they (the Board) had later given special leave; but as the ruling was said to affect many colonies with similar Orders in Council they had given special leave to appeal from it. Section 5, if construed literally, did seem to lead to the result reached by the West African Court of Appeal; for an application remained an " intended application " until heard in court. But that would mean that the application itself would have to be heard within twenty-one days. That could not have been intended. All that was intended was that notice should be lodged with the court within twenty-one days, and a copy served on the opposite party as soon as possible and in any case within a reasonable time before the date of the hearing. The appeal would be allowed.

GHANA: Marriage: Grant of representation

Austin Richter Coleman v. *Emma Kwaley Shang, alias Emma Kwaley Quartey* ([1961] 2 W.L.R. 562) was an appeal from a judgment of the Court of Appeal of Ghana, allowing an appeal from a judgment of the High Court, Eastern Judicial Division, in proceedings for the grant of letters of administration in respect of the estate of Stephen Coleman, deceased. The High Court had made a grant in favour of the appellant, the plaintiff in the action. The Court of Appeal revoked the grant and ordered that letters of administration be granted jointly to the present appellant and the respondent, the defendant in the action. The appellant now sought to restore the judgment of the High Court. The deceased, Stephen Coleman, an Osu man, first married a woman called Adeline Johnson and had three children by her, all of whom survived him. Later he married the present appellant's mother, Wilhelmina, under the Marriage Ordinance (Laws of the Gold Coast), and had five children by her, of whom the appellant was the sole survivor. Wilhelmina died in 1940. During the lifetime of Wilhelmina the deceased lived and cohabited with the present respondent and had ten children by her. After Wilhelmina died the deceased married the respondent in accordance with customary law.

The above recital of facts could be accepted for the purpose of deciding the important question which arose in the appeal, namely, whether the respondent was entitled either solely or jointly to a grant of letters of administration. They were described in the judgment as facts which were not in dispute. The accuracy of that statement was challenged on the present appeal by counsel for the appellant, but, as stated, the Board accepted them for the purpose of construing the relevant Acts and Ordinances which required to be considered. The issue for determination at the trial was settled on the summons for directions as follows: " Whether the plaintiff or the defendant was the proper person entitled to the grant of letters to administer the estate of the above-named deceased." The contest was, therefore, between the sole survivor of the deceased's marriage under the Marriage Ordinance and the woman whom he had married under customary native law on the death of his former wife.

By section 48 (1) of the Marriage Ordinance: " . . . where any person who is subject to native law or custom contracts a marriage, whether within or without [Ghana], in accordance with the provisions of this Ordinance . . . and such person dies intestate . . . leaving a widow or husband or any issue of such marriage . . . the personal property of such intestate . . . shall be distributed or descend in manner following, *viz.*—Two-thirds in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates in force on November 19, 1884, any native law or custom to the contrary notwithstanding; and one-third in accordance with the provisions of the native customary law which would have obtained if such person had not been married under this Ordinance." Section 83 of the Courts Ordinance (Laws of the Gold Coast, 1951, c. 4): " . . . the statutes of general application which were in force in England on July 24, 1874, shall be in force within the jurisdiction of the courts." By section 3 of the Interpretation Ordinance (Laws of the Gold Coast, 1951, c. 1): " The following words and expressions shall, if inserted in any ordinance . . . be understood as hereinafter defined or explained: . . . (31) ' Ordinance ' shall include . . . an order of Her Majesty in Council or an Act of the Imperial Parliament, applicable to the Gold Coast and in force . . . (45) Words in the singular include the plural and *vice versa.*" By section 2 of the Statute of 21 Hen. 8 (1529), c. 5: " In case any person die intestate . . . then the said ordinary . . . shall grant the administration of the goods of the . . . person deceased, to the widow of the same person deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good." In England before the passing of the Supreme Court of Judicature (Consolidation) Act, 1925, the court in exercise of its discretion granted administration to the widow of the intestate, to the exclusion of the next-of-kin or heir-at-law, except for good cause shown. Section 3 of the Statute of Distribution, 1670 (22 & 23 Car. 2, c. 10), provided: " All ordinaries and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following: that is to say, one-third part of the said surplusage to the wife of the intestate."

The Board stated that the first submission of counsel for the appellant was to the effect that on the proper construction of the Ordinance the only persons entitled to any portion of the two-thirds share of the personal estate of a deceased person dying intestate were his widow whom he had married under the Ordinance or the issue of such marriage, and any persons claiming under a marriage contracted by native customary law were relegated to such share of the remaining one-third as they could establish under that law. Some of the courts in Ghana appeared from time to time to have put that construction on the section, and the trial judge in the present case, referring to the respondent, said: " Her status being that of a wife married according to native custom could not override the claim of the plaintiff." The Board could not accept that construction of the section. In the case of intestacy of a person married in accordance with the Ordinance there were two conditions precedent to the application of the law of England relating to the distribution of the personal estates of intestates in force on November 19, 1884 [the date referred to in section 48 (1) of the Marriage Ordinance]: (1) A valid marriage under the Ordinance, and (2) the survival of a widow or husband or any issue of such marriage. Both those conditions were satisfied—a valid Ordinance marriage between the deceased and Wilhelmina and surviving issue of that marriage, namely, the appellant. It remained only to apply the Statute of Distribution. The question then arose whether the respondent, who was married under the customary native law, qualified as a " wife " within the meaning of that word in the Statute of Distribution as applied to marriages in Ghana which were lawful in that country but were not contracted in accordance with the provisions of the Marriage Ordinance and were potentially polygamous. Counsel contended that the words " wife " and " widow " in an English statute could not be construed as including the plural, as that would be repugnant to the legal conception of marriage in England which did not recognise a potentially polygamous union as a marriage.

Lord Brougham's Act (13 & 14 Vict. c. 21) applied only to enactments after 1850, and so did not include the Statute of Distribution, and the English Interpretation Act, 1889, was not in force in 1874, so that, for the purpose of construing the Act of Henry VIII and the Statute of Distribution in an English court before 1889 for the distribution of property within the jurisdiction of the English court, it would not have been permissible to read "wife" or "widow" as including "wives" or "widows." But entirely different considerations arose by reason of the provisions of the Courts Ordinance and the Interpretation Ordinance, the effect of which was that the Act of Henry VIII and the Statute of Distribution were included in the definition of "Ordinance" as being "Acts of the Imperial Parliament applicable to the Gold Coast and in force." Those statutes, therefore, were to be construed in their application to Ghana so that words in the singular included the plural unless the subject or context contained something repugnant to such construction, which was clearly not the case, the subject and context being the distribution of the personal property of an intestate validly married by the native law and custom of Ghana which recognised the existence of more than one wife or widow.

The Board did not desire to rest their decision solely on the language of the Interpretation Ordinance. In dealing with personal property in Ghana of an intestate domiciled there, and validly married in that country in accordance with its laws, the courts of Ghana were not precluded from making a grant of administration to a woman validly married to the intestate at his death by reason only of the use of the words "wife" and "widow" in the singular in the Act of Henry VIII and the Statute of Distribution. Apart from the Interpretation Ordinance the Board would hold that in the application of those statutes to Ghana the courts of that country would be entitled to apply the words "wife" and "widow" to all persons regarded as lawful wives or widows according to the law of Ghana. There might be cases in which special circumstances existed which necessitated a distinction between the position of the children of a potentially polygamous marriage and the wives or widows of such marriage, as indicated in *Khoo Hooi Leong* v. *Khoo Hean Kwee* ([1926] A.C. 529 at p. 543). But there were no such special circumstances in the present case, and the Board could find no valid reason for distinguishing in principle between the children and the widow of the marriage which was in question in the present appeal. The Board were in agreement with the decision of the Court of Appeal in making a joint grant to the appellant and the respondent on the footing that the latter was the widow of the deceased. She was entitled to a wife's proportion of the two-thirds of the personal value of the estate over and above any share of the remaining one-third to which she might be entitled by the relevant native customary law.

Reference had been made earlier to the challenge by the appellant to some of the facts which were stated as being "not in dispute." It was said that there was no proper proof of either of the marriages by native customary law, or that the deceased was an Osu man, or that the respondent was validly appointed to represent the family. When the court from whose judgment an appeal was brought stated that certain facts were admitted or not disputed it would, in the absence of agreement by counsel on both sides, require very strong evidence or exceptional circumstances before the Board would be disposed to go behind such a statement in a judgment, or to judge of its accuracy merely from a perusal of the notes taken in the courts of the country from which the appeal came.

The appeal would be dismissed.

Gift by deceased to son: Into hotchpot by son's children

Zalihe Veli v. *Sevim Ismail and Others* ([1960] 1 W.L.R. 1254) was an appeal from a judgment of the Supreme Court of Cyprus allowing an appeal from a judgment of the District Court of Paphos. Ismail Katri Bey (the deceased) died domiciled in Cyprus in 1954. He was survived by his wife, two daughters and two sons, and predeceased by another son, Nevzat Ismail. During his lifetime Nevzat Ismail had received from the deceased £1,650 worth of moveable and immoveable property by way of advancement or under marriage contract. Two of Nevzat Ismail's children, Ismail Nevzat Ismail Eff and Zahite Nevzat Ismail Eff, and his wife, Zalihe Veli, survived the deceased. Ismail N. I. Eff and Zahite N. I. Eff, the appellants before the Board, suing by their mother as next friend, brought an action against their grandmother, uncles and aunts aforesaid, claiming relief in connection with the deceased's estate under the Cyprus Wills and Succession Law, 1942, c. 220. The defendants counterclaimed that the plaintiffs must bring into hotchpot, in calculating their share in the statutory portion and undisposed portion (if any) of the estate, the sum of £1,650 advanced to Nevzat Ismail. At the trial before the District Judge of Paphos it was agreed between the parties that the question whether the plaintiffs were liable to bring the £1,650 into hotchpot was the only issue remaining between the parties.

The Board stated that the question was void of authority and turned wholly on a construction of the relevant sections. Sections 44 (*a*), 46, 49 and 51 of the Cyprus Wills and Succession Law were read, and the Board came to the conclusion that the £1,650 must be brought into hotchpot. English law had no application to the case. The appeal would be dismissed.

4. REPORTS

ET DONA FERENTES

Report of the Departmental Committee on Human Artificial Insemination (*Cmnd.* 1105/1960)

This committee was set up under the chairmanship of Lord Feversham on September 3, 1958, as a result of Lord Wheatley's decision in *Maclennan* v. *Maclennan*, 1958 S.C. 105; 1958 S.L.T. 12, that artificial insemination of a wife by a donor would not in law constitute adultery. This view of the law did not commend itself to the Archbishop of Canterbury nor to Professor D. M. Walker of Glasgow (1958 J.R. 54), but, it is suggested with respect, Lord Wheatley's opinion was both sound in principle, and is supported by a preponderance in weight as well as in number of the leading authorities.

By its terms of reference the Feversham Committee was directed " to inquire into the existing practice of human artificial insemination and its legal consequences and to consider whether, taking account of the interests of individuals involved and of society as a whole, any change in the law is necessary or desirable." The Report, published in July 1960, combines humanity with common sense, and should command general approval among thinking people. It is perhaps significant that only the minority have found it necessary to supplement their views through other media than by the published document which sets forth the majority and minority opinions. The minority considered that a child born as a result of A.I.D. should be regarded in law as legitimate, and, for the purposes of registration, be deemed the child of a husband who had consented to the insemination of his wife by a donor. A certain amount of strident publicity has supported this minority contention, which would only make sense if all legal distinction between legitimacy and illegitimacy were swept away. To discriminate legally against the child conceived in adultery or against the A.I.D. child of a single woman, while accepting the minority's suggestion, would have been logically and morally indefensible (*cf.* Pollard, 1961 M.L.R. 161–2).

Human artificial insemination is of three kinds—A.I.H. where by artificial means a wife is impregnated with her own husband's semen; A.I.D. where the semen of a man other than the husband is used; and A.I.H.D. where insemination is with the seed both of the husband and of a donor. The earliest recorded instance of human artificial insemination (a case of A.I.H. in 1790) was carried out by John Hunter, a Scottish doctor.

The committee was agreed that the practice of A.I.H. should not be condemned, thus adopting the views expressed by the majority of witnesses—with the important exception of those appearing on behalf of Roman Catholic bodies. The one recommendation (paras. 108 and 272) relative to A.I.H. was to the effect that, when a live child had been born as a result of this operation, this should constitute a bar to proceedings by either spouse on the ground of impotence.

Greater difficulties and keener controversy were experienced in connection with A.I.D. Though, as will be discussed presently, the majority of the committee considered that the practice at all of A.I.D. was to be discouraged, they recommended that when in fact spouses had agreed to resort to it, and a live child had been born in consequence, this (as in the case of A.I.H.) should be a bar to proceedings on grounds of impotency (paras. 156 and 272 (iii)). Moreover, a child conceived in this way should be given in Scotland the same rights of maintenance as are enjoyed by an adopted child. These proposals may be readily accepted, as may the recommendation to cover the *casus improvisus* disclosed in *Maclennan.* Though acceptance by a wife of A.I.D. without her husband's consent does not constitute adultery, it is a matrimonial offence of such gravity as to justify recognition as a ground for divorce or judicial separation (paras. 117 and 272 (i)). Legislative provision was accordingly recommended.

Consideration was given to the converse situation—when a husband without his wife's consent, or despite her objections, donates semen to fertilise some other woman. Both the Law Society of Scotland and the Law Society of England had suggested that this type of conduct should also be recognised as a new ground for divorce. This proposal was rejected by the committee on several grounds. The existing law regarding cruelty would cover cases where, knowing of his wife's objections and distress, a husband persisted in acting as donor to the detriment of her health. In other cases, public opinion would probably not regard donation of semen by a husband as an infringement of conjugal duty so serious as to warrant divorce (paras. 195, 272 (vi)).

Perhaps the most important recommendation (para. 272 (vii)) was that " While the practice of A.I.D. is strongly to be discouraged, it should not be declared criminal or be regulated by law (paras. 239 and 262)." The committee gave due consideration to the question whether, as some witnesses had suggested, A.I.D. might not already be criminal (paras. 96 and 97). In England the crime of conspiracy comprises agreements to commit acts which would not be criminal if one individual alone were concerned, while in Scotland the declaratory power of the High Court of Justiciary may extend in theory to the punishment of any new type of conduct which is *malum in se*. Nevertheless, persons agreeing to procure A.I.D. or carrying out that operation would not in practice be prosecuted, in the committee's opinion, unless there was an intention to support a false claim to an inheritance or to make a false statement regarding paternity in the Register of Births. This assumption is probably well founded. A.I.D. *simpliciter* may possibly in theory be criminal, but those concerned are not in practice prosecuted. Express prohibition by statute was considered undesirable, especially as this might lead to clandestine and less scrupulous procedures than are adopted at present. While disapproving of these procedures, the majority regarded them as falling within the category of " liberties "—*i.e.*, conduct which the law neither approves nor expressly prohibits (para. 267). Having reached this conclusion, the majority wisely declined to give implicit approval by proposing regulation. Associated also with this view was the decision not to recommend any amendment of the law relating to legitimacy or registration of birth. A child conceived as a result of A.I.D. or adultery (and it may be doubtful which) is in fact illegitimate, though in either case false entries may be, and frequently are, made in the Register of Births.

As an alternative to regularising resort to A.I.D., it had been suggested to the committee that sterility should be recognised as a ground for nullity. This suggestion was rejected partly *inter alia* because it would be difficult to obtain satisfactory evidence of absolute and incurable sterility, but in particular because the proposal might appear to recognise procreation of children as the principal object of marriage. Though the committee's conclusion is in general acceptable, the reasons are not altogether convincing. Medical evidence, like any other type of evidence (as the committee indeed recognised (para. 137)) is not normally required to establish absolute certainty; such a standard is not, for example, required in the law of divorce regarding incurable insanity. Where, through misfortune, no children can be procreated of a marriage because of unforeseen sterility, public opinion in this country would probably repudiate the suggestion that this should be a ground of nullity. Further consideration might, however, be given to cases where permanent sterility has been achieved by one spouse—especially before marriage—without the knowledge and consent of the other spouse and fraudulently concealed. A topical example is the South African case of *van Niekerk* v. *van Niekerk*, 1959 (4) S.A. 658 (G.W.) in which Wessels J. held that the procreation and rearing of children, if not the principal end of marriage, was an end equal at least to the other ends (*cf. Scholtens* (1961) 78 S.A.L.J. 159).

One may prophesy that advocates of A.I.D. are likely to take full advantage from the difficulty (para. 137) of obtaining satisfactory evidence that a husband is sterile. By using the techniques of A.I.D. or A.I.H.D. they will presumably seek to invoke the doctrine *pater est quem nuptiae demonstrant* to justify registration of a child as legitimate even though the marriage had been unfruitful for many years before resort to these techniques. It is submitted that in such circumstances the presumption would *not* apply, because strongly contrary to the probabilities. The latest variation on A.I.H.—combining the husband's spermatozoa with a donor's seminal plasma (para. 70)—would not, of course, fall within the category of A.I.H.D.

The committee—in particular the majority—has clearly discharged a very difficult public duty with ability, fairness and common sense. One may hope that the Report will in due course engender legislation as recommended—and not join those many other Reports which appear doomed to sterility.

T. B. S.

CURRENT PERIODICAL LITERATURE

SUMMARIES

By S. G. Kermack, c.b.e., m.a., ll.b., Advocate, Sheriff-Substitute of Renfrew and Argyll at Oban

American Law

Modern Law Review, March 1961: "Contempt by Publication in the United States," by Professor Donnelly, Yale, and Ronald Goldfarb, Fellow of New York University.

New York University Law Review, February 1961 and also March 1961: Annual Survey of American Law, 1960; articles on specific topics by the university professorial staff.

Oklahoma Law Review, February 1961: "Sinclair-Masterton, the Role of Federal Courts in applying State Law," by Professor Maurice H. Merrill, University of Oklahoma.

American Bar Association Journal, February 1961: "The Administrative Process—Third Decade," by Dean James M. Landis; "Place of Federal Judicial Councils in Administration of the Courts," by J. Edward Lumbard, Chief Judge of U.S. Court of Appeals. In the March and April numbers: "Federal Administrative Law in the Decade of the Sixties," by Earl W. Kintner, Chairman of the Federal Trade Commission. Also in the April number: "The Validity of Postmarks," by C. P. Collins, Connecticut Bar.

Western Political Quarterly, March 1961: "The Supreme Court of the United States, 1959–60," by Paul C. Bartholomew, University of Notre Dame.

New York University Law Review, April 1961: "The Bill of Rights and the States," by William J. Brennan, Jr., Associate Justice of the Supreme Court; "The Sit-in Demonstration, Criminal Trespass or Constitutional Right," by Frank E. Schwelb, New York Bar; "Free Press—Fair Trial," by Ronald Goldfarb, New York and California Bars; and the May number: "Administration by Contract," by Professor Arthur S. Miller, Emory University Law School.

British Tax Review, March–April 1961, "United States Taxation of Non-resident Citizens," by H. R. Kent.

British Public Law

Public Law, Spring 1961: "The Reluctant Executive," by James T. Craig, Queen's University of Belfast (Statutory Instruments Act: Crown Proceedings Act).

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The Lawyer, Trinity 1961: "Restrictive Practices: The Registrar's Report," by P. W. S. Andrews, Nuffield College, Oxford.

British Tax Review, March–April 1961: "The Income Tax Fantasy," by W. Phillips.

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COMMONWEALTH LAW

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Modern Law Review, May 1961: "Copyright and the Statute of Westminster," by F. A. R. Bennion, Barrister-at-Law.

Canadian Bar Review, May 1961: "Uniformity of Legislation in Canada: Conditional Sales," by Jacob S. Ziegel, British Columbia Bar; "Administrative Law in Canada," by John Willis, University of Toronto.

COMPARATIVE AND FOREIGN LAW

Public Law, Spring 1961: "Federalism in West Germany," by Professor G. Sawer, Australian National University, Canberra.

Modern Law Review, March 1961: "Resale Price Maintenance" (British and American provisions), by V. L. Korah, University College, London.

British Tax Review, January–February 1961: "Tax Treatment of Corporations and Shareholders in the United States and Great Britain," by G. S. A. Wheatcroft.

Modern Law Review, May 1961: "Development of the Law of Torts in Israel," by R. Gottschalk, Member of the Israeli Bar.

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CONFLICT OF LAWS

Canadian Bar Review, March 1961: "De la Responsabilité civile extra-contractuelle en droit international privé québecois," by Professor Paul-André Crépeau, McGill University.

CURRENT AFFAIRS

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The Lawyer—the new title of *The Oxford Lawyer*: " Street Offences," by David Weitzman, Q.C., M.P.; " Colour Bar: Caucasians Only " by Alec Samuels, Lecturer, University of Southampton; " Current Attitudes to Capital Punishment," by D. C. M. Yardley, St. Edmund Hall, Oxford.

EVIDENCE

Modern Law Review, May 1961: " *Cook* v. *Lewis* Re-examined," by T. Brian Hogan, University of Nottingham (Joint tortfeasors).

FORENSIC SCIENCE

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American Bar Association Journal, March 1961: " Politico-Legal Needs of Space Exploration," by Philip B. Yeager, Consultant, Committee on Science and Astronautics of House of Representatives.

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LEGAL EDUCATION

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LEGAL HISTORY

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PARLIAMENT

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PROFESSIONAL ETHICS

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RECENT LITERATURE

An Outline of Administrative and Local Government Law in Scotland. By J. Bennett Miller, Solicitor. 1961. Edinburgh: W. Green & Son, Ltd. £3 net.

The output of legislation relating to Scottish Administrative and Local Government Law since the Second World War has been so continuous and extensive as to discourage attempts to produce a comprehensive volume bringing the subject up to date. Mr. Bennett Miller has completed a volume designed to fill this gap in Scottish legal literature. His book bears to have been written for students for whom there is undoubtedly a pronounced need for an exposition of the law of local government and public administration as it now stands. As a student's textbook it should be an admirable aid to study. It covers the whole range of what is now an extensive subject and indeed possibly errs in the respect of presenting certain topics in more detail than a student may wish or be reasonably expected to profess knowledge, *e.g.*, on the subject of the detailed calculation of government grants or the law relating to local government elections.

This book will, however, serve a much wider purpose than that of a student's textbook. For those whose duties involve frequent application of the Local Government Acts there has been a need for a book such as this which provides a valuable summary of the whole range of administrative law and which will readily direct the attention of the inquirer to the source for which he is searching. Not least useful in this connection will be the table of cases and the index which the book incorporates.

This is an Administrative Law textbook which is not merely a recital of the many Local Government Acts. The administrative structure, controls, and finance are analysed and critically examined. The long list of local government functions is clearly presented and described, although there is in this section an occasional heading where one feels the subject has been over-summarised. No doubt, however, the author has had to be mindful of the wide scope of his subject and of the need to keep the size of the volume within limits, not least with an eye to the price which students must be asked to pay for the book which it is hoped will not deter students from acquiring such a volume essential to a complete study of Scottish Administrative Law.

The book has two closing chapters, on acquisition of land by local authorities and actions against them. The value of chapters such as these should lead to the volume finding its way not only into the hands of students and the offices of those specialising in Administrative Law, but also on to the bookshelves of many lawyers in general practice whose clients' interests are these days inevitably and increasingly affected by the activities of public bodies.

M. R. McLarty.

A History of Lay Judges. By John P. Dawson, Professor of Law, Harvard University. 1960. Harvard University Press. London: Oxford University Press. 52s. net.

This is a clearly written account of the role, up to approximately 1800, of lay judges in the administration of justice in England and their gradual displacement by professional judges, treated from an historical and comparative aspect in relation to the history of lay judges in Rome, in France and in Germany, and treated necessarily so, for, as Professor Dawson says, to understand the development in England it is necessary to trace the causes and consequences of the displacement of lay judges in Rome, France and Germany. As an American, Professor Dawson not unnaturally looks at the position from the eyes of an Anglo-American lawyer, emphasising English law because of America's debt to it, and hence he does not refer to Scotland, where lay judges, as judges, suitors of court or jurors are familiar to the modern lawyer and to the legal historian. His treatment of his subject involves a study of the wood in the light of the trees, for his object is to supply perspective, as he says, by collating the works of numerous specialists, the standard works, *e.g.*, in England that of Holdsworth, and he has therefore limited his citations. And he gives largest place to the local courts because of the previous inadequate treatment of them.

Pointing out that in some earlier societies there is a high degree of social order without any specialised institutions or specially qualified persons to settle disputes, Professor Dawson says the later developments depend on many factors such as sources of the law, types of sanctions, alternative or competing means of making group decisions. Courts react on societies, especially in earlier times where the courts combined other functions with that of adjudication, and the existence of lay judges had far-reaching effects in England, France and Germany. One important factor in the development to professionalism was the influence of the Roman law, another was the political and social environments in the Middle Ages in England, France and Germany. The adoption of Canonist procedure in France and Germany caused great changes in the court structure in these countries, which in turn affected their society. The political factor was indeed important. "Courts were clearly an avenue to control and influence within the groups by which they were organised," their decisions having weight, and mobilising a public force, even if that was only indirectly supplied by the central government. Their personnel was important, and the transition from lay to professional was part of the political scene.

How is one to define "professional" and "lay"? Professor Dawson, admitting the difficulty, regards a "professional" as one applying a substantial part of his time and energy with some degree of continuity, usually paid and with some specialist skill and training; if he lacks the last, he is then an "untrained professional." The lay judge is the opposite; one acting as a side-line with unplanned irregularity. Another difficulty is the definition of "public" and "private" courts. The modern monopoly of the state in adjudication did not really exist prior to 1800 and, especially in the early Middle Ages, the settlement of disputes and the punishment of wrongs was a private matter, and then later came assemblies of tribes or neighbours, which were "public" courts in a sense. Public courts in the true sense grew out of the development of kingship. The growth of feudalism produced courts of lords and vassals which were private, and even where they acquired a greater jurisdiction Professor Dawson still treats them as private. But though lords acquired power to appoint judges, their powers were restricted by the duty to follow the rules of substantive law or procedure and by the need for the concurrence of individuals.

Starting with an examination of the law of Greece, which is only a starting point and therefore very briefly treated of, and passing to Roman law and noting, in particular, the part played by the lay praetors, Professor Dawson goes on to deal with the popular courts in France and the gradual replacement of the lay element by the professionals in the sixteenth, seventeenth and eighteenth centuries. In France the Monarchy was weak and broke down in the tenth and eleventh centuries, and this led to the replacement of community courts by courts of local feudal lords. The nobles acquired extensive court-keeping and appointing powers and when the Crown was later rebuilt they had wide control. Laymen thus became discouraged. The jury system was well known but not widely used, and the Roman-Canonist procedure was adopted in the thirteenth century, aided by a system of appeals to the royal courts, so that there developed a theory of the power of adjudication resting in the Crown. Power of decision then passed to judges appointed by the Crown or by local feudal lords. What really caused the disappearance of the lay judges in France was the adoption of the Roman-Canonist system of procedure, especially its methods of investigation and proof, and the adoption was due to the French Monarchy being unable to organise and adopt an alternative. The whole function of adjudication was thus transferred from the old lay community courts; the seignorial courts were finally abolished in 1789, and the professional then reigned supreme.

Then Professor Dawson proceeds to note the changes which occurred in Germany, which were about 200 years later, and where the medieval "Schoffen" courts of permanent officers, who were also landowners and acted as agents of the central government, ruled until civil war and the breakdown of Imperial authority in the thirteenth century caused courts to pass into private hands, such as local lords and cities and ancient communities, the "Schoffen" surviving only as spokesmen of local traditions. Local leaders, however, came to develop "free" courts of "Schoffen" till these were suppressed. Weakness of government in the fourteenth century and the resulting lack of organisation of local custom opened the door to Roman law. The Schoffen courts and much of the law they applied were submerged, in Professor Dawson's words, in Roman law, preceded by the Roman-Canonist procedure between the fifteenth and the end of the sixteenth centuries, and once again, as in France, a new system of appeals played a vital part. The substitution of the personal influence of assessors and officers trained in Canon or Roman law aided the advance of Roman law and marked a shift of political power and influence. The judicial function became a subject of private ownership in the court-keeping nobles, who obtained great power, and then there followed a piecemeal transition to publicly owned courts, which was only completed in the nineteenth century. The social and political influences of these changes in both countries are also discussed by the author. In the end of the day, the Crown was to triumph over the great feudal lords.

In England, which, as we have said, is the basis of this study, the Professor deals with the royal and the local courts—particularly the latter, noting the part played by juries, justices of the peace, and manor courts, in which power passed to juries under a well-known system and by which the lord was limited, and the burgh courts. But the whole point, in contrast with France and Germany, is that the Monarchy here was strong, local self-government was preserved and encouraged, and local courts, such as manor courts, flourished as a part of that system. The procedural compromises of the thirteenth century in England in contrast to the Continent settled the future development for many ages. The manor courts built up procedure around juries of the neighbourhood. The author takes a new view of Chancery, rejecting the theory that it used Canonist procedure on a large scale, though he admits that there are analogies. But the use of lay examiners and the inadequate use of professionals in Chancery led to disasters in the eighteenth century; the " deep-rooted " reluctance to use the professional led eventually to the complete breakdown of the system. The employment of laymen as fact-collectors and later as arbiters thus failed.

Perhaps the most interesting part of the volume is the final chapter on the author's summary and conclusions. Here he examines the reasons for the participation in the administration of justice by numbers of persons or community action—that the administration of justice is so vital to community organisation (which, however, is more difficult to justify as law becomes more complex); that those involved may accept the result more readily, which may have had a part in some spheres, and which is linked with the right to judgment by one's peers, though this only at a later stage came to be associated with jury trial; that a legal system is improved through special experience; and, in criminal cases, that it is a means of adjusting law to the purposes and convictions of the whole community in good sense and practical wisdom. What part do these factors historically play? The question relates chiefly to England, for there alone did the influence of lay judges grow, despite the early use of trained professional judges. The use of lay judges in England was due to the dire necessity of government to economise in the twelfth and thirteenth centuries, the most important and lasting measure being the common law jury; but the appointment of laymen to preside at trials where they had local prestige and knowledge and where there was thus a likely acceptance of their judgment was also of importance. All this was part of a wider scheme of English government to shed the load of work. While, however, the courts of the greater lordships later lost their major jurisdiction, the manor courts were developed unhindered, while the Crown from the fourteenth century gave more and more power to justices of the peace. This self-government in the manor courts was a good thing for English society, says Professor Dawson, giving self-respect, reliance, training and a sense of responsibility, and so bringing out many good moral qualities in the community. In Chancery the collection of evidence and the actual decision by laymen infused equity for long with good sense and practicality, but eventually through defects in procedure, the elaboration of pleadings, the development of the system of equity and the increase in the volume of work, the system failed and Chancery became a scandal.

It is interesting to note, in the light of twentieth-century reactions, that Professor Dawson praises the jury system, to which the American, he says, is much attached, having found much good in it.

He concludes by referring once again to the contrasting weakness at the vital epochs in France and in Germany. None of the developments need have occurred, at any rate on such a scale. In America, even more than in England, the common law courts, says the author, have become guardians of constitutionalism and its source may be found in the courts of neighbours.

The volume, which is a notable contribution to the history of the law, concludes with a valuable index.

G. C. H. P.

Attendance Centres. An enquiry by the Cambridge Institute of Criminology carried out by F. H. McClintock, M. A. Walker and N. C. Savill. 1961. London: Macmillan & Co. Ltd. Price 28s. net.

As an experiment in deterrence the Criminal Justice Act of 1948 contained provisions enabling courts of summary jurisdiction in England to impose upon boys not less than twelve and under seventeen years of age a punishment which requires them to attend at an attendance centre for a total period of not more than twelve hours. This is a punishment with which we are not familiar since no similar provisions have been incorporated in criminal justice legislation applying to Scotland.

This new form of punishment is no more than an extension of the time-honoured penalty suffered by the schoolboy of being "kept in." Attendance at a centre was intended as a punishment for young offenders with no significant delinquent history who had not been sent to an approved school, borstal, a detention centre or prison. The courts are empowered in those cases in which a sentence of imprisonment could—but for the restrictions against sending children and young persons to prison—be imposed, to make an order requiring the young offender to attend at an attendance centre on not more than one occasion on any one day, or for more than three hours on any one occasion for a period not exceeding a total of twelve hours. The purpose of this form of punishment, as described by its proposer Lord Templewood, was "to deprive young offenders of a half holiday, to prevent their going to a football match or a cinema and, perhaps not less important, to make them ridiculous to their friends and relatives."

The first attendance centre was opened in London in 1950 and by the end of 1958 there were in the whole of England thirty-seven which, in the year 1957, dealt with some 1,750 attendees. The inquiry carried out by the Cambridge Institute of Criminology into the results achieved by these centres discloses that although the régime followed in each was different there was a similarity in that the aim was not only to punish the offenders by depriving them of their leisure, but by instruction and training to improve their characters and, in particular, to teach them to make proper use of their leisure. With only one or two exceptions the centres were staffed by police officers and accordingly there was in all of them an emphasis on hygiene, tidiness and personal smartness and alertness in response to instructions. Saturday afternoon was the most common time at which the young offender was ordered to attend at a centre, usually for two hours on six successive Saturdays. Almost without exception the officers in charge of centres considered a maximum of twelve hours attendance to be quite inadequate either from a punitive or reformative point of view and recommended that the period should be doubled or trebled.

The young offender sentenced to attend a centre would in almost all cases be required to carry out some tasks during his hours of attendance. There were great variations in the tasks. Many were of a monotonous, punitive and disagreeable nature, while in a few centres run by officers with a reformative outlook the work was stimulating and constructive, instruction being given to the boys in such subjects as carpentry, personal hygiene, care of clothing, first-aid and artificial respiration, cycle maintenance and the rules of the Highway Code. A form of activity common to all centres was physical training.

Apart from a survey of the arrangements for the establishment of attendance centres and the régime followed in each, the Cambridge inquiry examined in detail the cases of about one thousand five hundred young offenders ordered to attend centres between 1950 and 1957 and followed up the known behaviour of these boys over a two-year period.

Although an order by a court that a young offender should attend at a centre was intended to be reserved for the juvenile guilty of less serious offences and one whose delinquency could be regarded as still at an early stage it is surprising to find that the inquiry disclosed that only 40 per cent. of the attendees were first offenders. In 46 per cent. of the cases attendance centre orders were made in conjunction with probation orders. The offender either being put on probation for another offence at the time the attendance centre order was made, or being on probation at the time of committal of the offence in respect of which the attendance centre order was made, the existing probation order was kept in force. Finally the follow-up study over a two-year period disclosed a general failure rate amongst offenders required to attend at centres of 38 per cent. Not unnaturally the results were less unsatisfactory amongst first offenders, where the rate was 27 per cent., and, significantly, the attendance centres' best results were achieved amongst the older age group of first offenders, the fifteen to sixteen age group, where the failure rate was only 25 per cent.

J. V. M. S.

Essays in Constitutional Law. By R. F. V. Heuston M.A., Fellow of Pembroke College, Oxford. 1961. London: Stevens & Sons Ltd. x and 186 pp. 42s. net.

These essays, we are told, originated in a course of lectures. That origin still marks them, though not to their detriment. In each the particular theme stands out clearly after the manner of a lecture and in a way that is sometimes missing from the written word intended as such. The subjects are traditional ones, Sovereignty of Parliament, The Rule of Law, Personal Liberty, Judicial Control, and the like. This choice of tradition springs from the author's belief that any worthwhile solution to the problems raised by administrative law must be firmly based on the principles expounded by the great names of the past. Not all the views expressed are however as traditional as the subject-matter. There is certainly novelty in the essay on the Sovereignty of Parliament, though some might think that innovation does not go far enough. The author emphasises the modern questions which can be usefully asked on the subject, and he is inclined to accept, in some form, the "New View," which sees the concept of the sovereignty of Parliament as a somewhat narrower one than was at one time thought. Yet he holds back from being a full-blooded modernist. While willing to apply the theories of Kelsen (p. 24) to the events of 1688 he is reluctant to do so in the field of Parliament itself.

On other essays, such as that on the Rule of Law, tradition has a greater hold, and in that one the traditional view is well illustrated and argued. Perhaps it is too fervently argued on occasion. It is said that no one has sought to criticise Dicey's meaning "that a man may with us be punished for a breach of the law, but he can be punished for nothing else." Yet, this is not the whole truth. It has been often enough emphasised that the sentence is almost empty of meaning unless certain moral or political values are assumed in the law. If they are not the phrase could connote a menace, and certainly need not indicate merit. This sort of problem arises elsewhere. To say that in *Roberts* v. *Hopwood* the courts were only concerned to see that the "power exercised has been the power conferred" is surely to paper over too many cracks. Courts cannot be detached from real life, or in such cases, be unaffected by anything but abstract law. It is perhaps one of the modern difficulties that we either think that they can be or else expect them to be. Overtly or not, value judgments are inherent in more and more legal judgments. Similarly some would say that the comments on *Liversidge* v. *Anderson* rely too much on form and appearances, making too little allowance for political reality.

Certainly respect for ancient principles and institutions is desirable. It is equally certain that the merits of such principles does from time to time need the sort of forthright restatement that is to be found here. Yet respect and restatement can be harmful unless accompanied by re-examination, and re-examination runs unevenly through the essays. They may however provoke it, for the whole collection is stimulating, and one wishes indeed that some parts, suggestions for reform for example, had been expanded. The collection is also of value at a time when the mass of detail in modern constitutional law prevents many from distinguishing the wood from the trees. Because it has such usefulness one regrets the more sharply parts or passages which irritate without adding to the argument. This may be one of the marks left by the origin, for in the lecture form the same passages may have been helpful. As it is, the reader is unmoved by reading that Robert Emmett is a connection of the author through a common ancestor, five generations back. Similarly such pages as those upon the University of origin of the doctrine of the Sovereignty of Parliament, or some of the comments upon persons connected with it can irritate and make it harder to settle to the book. More seriously this style can lead on to other comments which, in the printed form, do much less than justice to their basic material, such as those upon Lord Cooper's opinion in *McCormack's* case. These are blemishes which the reader should disregard, and if he does he will find much worthwhile reading in these essays.

J. D. B. Mitchell.

The Crusade against Capital Punishment in Great Britain. By Elizabeth Orman Tuttle. With a Foreword by Dr. Edward Glover. Published under the auspices of the Institute for the Study and Treatment of Delinquency. 1961. London: Stevens & Sons Ltd. 30s. net.

The Struggle for Penal Reform. By Gordon Rose. With a Foreword by Hugh Klare. Published under the auspices of the Institute for the Study and Treatment of Delinquency. 1961. London: Stevens & Sons Ltd. £2 10s. net.

These two books, which are the third and fourth volumes to be published in the new Library of Criminology, will be welcomed by all who are concerned with the administration of criminal justice. " Capital punishment and corporal punishment arouse heated emotions both in their proponents and opponents and considerable interest is taken in both subjects by the general public. Few people care much about prison conditions or the administration of justice but whether or not one should hang murderers or beat children judicially is always good for columns of correspondence in the newspapers." Apart from a chapter on capital and corporal punishment, from which the foregoing paragraph is taken, Dr. Rose has left consideration of the question of capital punishment to Mrs. Tuttle, who in her book, *The Crusade against Capital Punishment in Great Britain*, sketches with admirable lack of emotion—although she herself is an abolitionist—the protracted struggle to abolish capital punishment which commenced early in the nineteenth century. The aim of the campaign was not only modest but laudable. It was the substitution of a less final punishment than death for such offences as the shoplifting of goods of the value of five shillings or the theft of forty shillings from a dwelling-house, and no representations were at that time made for the abolition of the death penalty in the case of all crimes. In fact the abolitionists of those days seemed to regard death as a singularly appropriate punishment for murder. The middle of the nineteenth century, however, saw the beginning of a vigorous campaign for the total abolition of capital punishment. From then down to the present day there has been constant agitation on the question " to hang or not to hang " which on practical and moral grounds has occasioned much anxiety to many people.

The greater part of the book is devoted to the intensive and almost ceaseless moves and counter-moves during the past fifteen years to do away with the death penalty as the punishment for murder. The arguments put forward for and against hanging in the many debates in Parliament and the conclusions and recommendations of the Royal Commissions of 1864 and 1949 and of the Select Committees of 1819 and 1929 are all faithfully and impartially referred to by Mrs. Tuttle.

Reluctance to abolish the death penalty but anxiety to ameliorate its application characterised almost all deliberations on the subject, the most recent manifestation of this vacillating attempt to compromise being the disastrous—but it is to be devoutly hoped only very temporary—Homicide Act of 1957.

This book might be criticised as too straightforward a survey of the subject which, by presenting no case on either side, except perhaps subtly, leaves the reader in doubt as to how the question should be answered. On the one hand, for example, there is Sir William Harcourt's argument that if the death penalty is a deterrent he would vote for it and support it to the last " for the life of the man murdered was better worth preserving than that of the man who murdered." On the other hand we are told that, since many murderers are moved by abnormal impulses, the fear of capital punishment is no deterrent. It is probably in the conflict so created that the value of this book lies for it may compel us all critically to re-examine our personal approach to the whole question of the death penalty.

In *The Struggle for Penal Reform* Gordon Rose considers—mainly from the standpoint of the student of social history—the chequered but evident progress in penal matters which has taken place in England in the last hundred years. The account is written against the background of the work done by such societies as the Howard Association, the Humanitarian League, and the Penal Reform League which campaigned for and achieved not only a more enlightened official penal policy but an improvement in the conditions and treatment of convicts in prisons. The book unfolds the demands of such societies for the abandonment of the vain attempt to prevent crime by creating terror through harsh punishment, harshly carried out, and their pressures for the introduction instead of a programme to rehabilitate and reform convicts. Dr. Rose describes the introduction of imaginative and, at the time they were made, daring proposals, aimed at keeping out of prison young persons, first offenders and all those for whom deprivation of liberty in an institution was neither a just punishment nor one from which any good either to the individual or to society could be expected. Among the developments discussed are probation, legal aid for prisoners brought to trial, separate and better provisions for the trial and treatment of juveniles, the provision of time for payment of fines, the removal from prison and the separate care of the feeble-minded offender, changed patterns in criminality and essential improvements in prison management.

A brief history of all the penal reform societies referred to in the book is included in the Appendices which also contain a comprehensive bibliography of the publications of those societies and a most illuminating statistical survey of criminal trends for the period from 1857 to 1959.

This volume provides a stimulating picture of penal reform from a new angle, that of the reform societies. Although it is necessarily disjointed because of the attempt to cover a vast subject in a book of manageable proportions, and in some instances it assumes a greater knowledge of personalities and events than the majority of readers will have, it contains much information some of which will provoke worthwhile thoughts on the important subjects with which it deals.

J. V. M. S.

Congress Versus the Supreme Court 1957–1960. By C. Herman Pritchett. 1961. Minneapolis: University of Minnesota Press. London: Oxford University Press. 30s. net.

In the system of government of the United States, as it has evolved, the Supreme Court plays a curiously ambivalent part. On the one hand it is the ultimate judicial organ of the Federation and as such, by American standards at least, an august and revered institution. On the other hand, as the authorised interpreter of the nation's foundation-charter, it must of necessity touch upon the kind of issues which in this country would be reserved for political debate. In this role it may draw upon itself public criticism which to the British observer, accustomed to a quasi-sanctified judiciary, must seem almost indecently outspoken. A case with overt political overtones, such as the recent Electrical Trades Union action, is here a rarity; but the determination of such questions forms a normal part of the Supreme Court's work. In such circumstances it cannot be wondered at that the court itself becomes at times involved in the hurly-burly of political controversy.

The latest episode in this story of judicial and political entanglement is the subject of the present volume. Professor Pritchett of the University of Chicago is one of those academic commentators, with a background combining law and political science, who specialise in chronicling the Supreme Court's activities from year to year. Here, in a series of lectures delivered at the University of Minnesota, he tells how in the years 1957 to 1960 an attack upon the Supreme Court of unusual vigour built up from several directions.

The trouble had started three years earlier, when the court issued its epoch-making judgment in the case of *Brown* v. *Board of Education of Topeka*, unanimously declaring racial segregation in the public schools to be contrary to the " equal protection of the laws " promised in the Fourteenth Amendment. Much of the fury of the Southerners at this attack on their " way of life " was directed against the justices personally. Nevertheless it was not an issue calculated to win wide sympathy, for the court had undoubtedly been expressing the views of the great majority of Americans. The attacks made by prominent Southerners against the court might then have served only to alienate them even further from the mass of their fellow citizens, had not another controversy arisen with which they could ally themselves. In a series of judgments concerning such matters as loyalty-oaths for public employees (including university professors), the issue of passports, and the investigatory activities of the Un-American Activities Committee of the House of Representatives, the court had come down strongly on the side of personal liberty. In so doing, it appeared to certain partisans to be undermining the security regulations of the federal and state governments. In the state of widespread hysteria whipped up by the unspeakable Senator Joseph McCarthy and continuing even after his own discrediting, it was easy to depict the Justices of the Supreme Court as at best muddle-headed idealists, unalive to the Red menace, and at worst secret Soviet sympathisers themselves.

If this agitation had been confined to the usual organs of political unrest, such as press columnists, radio and television commentators and Congressmen anxious to curry favour with the electorate, it would have occasioned no surprise. If the function of the Supreme Court is to be a kind of gyroscope in the ship of state, some people are bound to be thrown around as it pulls the vessel on to an even keel once more. Even when the American Bar Association upbraided the

Supreme Court and urged Congress to legislate to reverse its rulings in the security cases, it provoked little astonishment, for the Association had taken upon itself to keep a watch on the Communist menace and had set up a "Special Committee on Communist Tactics, Strategy and Objectives." But when in 1958 the Conference of Chief Justices of the States in a learned and sober report criticised the Supreme Court for indulging too frequently in policy-making decisions and disturbing the traditional balance between state and federal rights, then events had taken a graver turn. For both the pro-segregation and the anti-Communist agitators saw in this pronouncement implied support for their stand from an unimpeachable authority.

It would be pleasing to record that the Supreme Court rode out this storm with majestic unconcern and emerged unscathed with enhanced prestige. But at least in the loyalty-test cases the scope of earlier decisions was narrowed down very considerably. Thus in *Lerner* v. *Casey* the court upheld the dismissal as a person of "doubtful trust and reliability" of a New York subway conductor who had refused to tell the city authorities whether he was a member of the Communist Party. Some of the justices, too, showed a readiness in their judgments to come to terms with and placate their critics. Certain of the Eisenhower appointees were of a cautious disposition, though not notably Chief Justice Warren and Justice Brennan.

But at least it can be said that numerous attempts which were made in Congress to curb the powers of the court met with no success. It is perhaps not generally realised that, while the Constitution by Article III outlines the judicial power of the United States and establishes a Supreme Court, its appellate jurisdiction is subject to "such Exceptions, and under such Regulations as the Congress may by Law have directed." That jurisdiction has been conferred by various statutes starting with the Judiciary Act of 1789, but what Congress has granted it can also take away or curtail. Several attempts were made to remove from the court certain types of appeal. One Representative rather naïvely introduced a bill that inferior courts should not be bound by any decision of the Supreme Court "which conflicts with the legal principle of adhering to prior decisions and which is based upon considerations other than legal." Certain Senators subjected the President's nominees for vacancies on the court to intensive questioning and voted against those whose protestations were not fervent enough. But whatever damage may have been done to the reputations of individual justices by this process of vilification, the power and reputation of the court as an institution remained intact.

Professor Pritchett does not attempt to conceal where his own sympathies lie. Thus he observes of the American Bar Association that "the exhilaration of Communist-hunting had deranged their professional judgment." But on so topical and vital a subject no intelligent American could fail to have an opinion, and his frank expression of it has enabled him to write a lively and provocative book on a unique institution which, as he shows, is "an instrument of both politics and justice."

I. D. Willock.

JURIDICAL REVIEW

REGIAM MAJESTATEM

A Reconsideration

"It would be possible by a laborious effort to produce an entirely new text of Regiam Majestatem with a full apparatus criticus, and so long ago as 1937 Mr. John Buchanan indicated the line of attack. Such a new text would probably have to be based mainly on the Bute and Cromertie MSS and would therefore not differ substantially from Thomson's version. Its errors and omissions would have to be faithfully reproduced or else amended more or less in the fashion adopted by Skene. But the question is, to what purpose could such a text be put? It would not be the text of the Regiam Majestatem of professional tradition familiar to Scottish lawyers for 350 years. The identification of references would be exceedingly troublesome. There would be no assurance that it represented what the compiler actually wrote. It would at best reproduce the phase of scribal transcription which was reached midway between the original and the authorised version of 1609, with some at least of the errors and additions which had crept in by the last quarter of the fourteenth century. For closer standards of accuracy the material does not exist. As it happens the textual variations are of comparatively little account *to a lawyer*[1] throughout the greater part of the work, though there are many passages on which it would be valuable to know exactly what the compiler did write. It is just because we do not know, and probably never shall know exactly what the compiler did write in these passages, that some of the 'primeval doubt' will never be dispelled."

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[1] Lord Cooper's italics. *Cf.* the heading to section III of his introduction.

This passage is taken from the introduction to Lord Cooper's edition of RM [2] and may serve as a summary of the scholastic history of that text, as well as a guide to the imperfections of what should not become the scholar's *editio princeps.* First published in 1609 in a wholly arbitrary version by Sir John Skene, RM had to wait more than two hundred years before Thomas Thomson printed, in the first volume of the *Acts of the Parliaments of Scotland*, an edition based upon the best of the manuscripts available to him. It is an edition devoid of critical apparatus, and not until Mr. Buchanan's pioneering analysis of the manuscripts [3] in 1937 were scholars made aware of the manuscripts used by Thomson.[4]

In the present article references are usually to the book and chapter numbers of this, the Record edition. They can easily be found in Lord Cooper's edition in his subheadings to each chapter.

Lord Cooper published in the Stair Society in 1947 an edition which was based " on the text of Sir John Skene." In the above passage from his introduction he argues the impossibility of a task which Mr. Buchanan showed to be both possible and fruitful. Lord Cooper did not ignore Mr. Buchanan's work: he bowed to it and passed it by. In 1955 Mr. H. G. Richardson published a valuable addition to our knowledge of the canonist and civilian sources of RM, with a renewed plea for an edition based on the manuscripts.[5] Mr. Richardson does not mention Mr. Buchanan's work.[6]

Now Lord Cooper remarked that RM is not one book but two, " the original compilation and the rediscovered

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[2] *Regiam Majestatem and Quoniam Attachiamenta*, ed. Lord Cooper, Stair Society, vol. 11, 1947, p. 18.

[3] " The MSS. of Regiam Maiestatem," by John Buchanan, XLIX J.R. 217.

[4] *Ibid.* pp. 224–225. The Bute MS has since been made available and it is now clear that Thomson used it.

[5] " Roman Law in the *Regiam Majestatem*," by H. G. Richardson, LXVII J.R. 155.

[6] There has been much comment on the date and " authenticity " of RM since Skene's edition. A good survey of this is given by Lord Cooper in chapter 6 of *An Introductory Survey of the Sources and Literature of Scots Law*, Stair Society, vol. 1, 1936.

Regiam Majestatem of professional tradition."[7] It is more properly three books—these two, and between them the fifteenth-century RM of the manuscript law collections. On Lord Cooper's thesis (that RM was written in the earlier thirteenth century) it would have been valuable to distinguish these three. The distinction is still important because any writer on the subject is working from the known (the Cooper-Skene printed text) to the unknown but knowable (the fifteenth-century manuscripts, never critically edited) and therefrom to the original compilation so far as deducible. The original compilation is related to Skene's text only through the manuscript versions; on the evidence of Skene's text, Lord Cooper dated the original compilation to *c.* 1230–1250. Mr. Richardson on very sound evidence moves the earliest possible date to *c.* 1240 and suggests that the compiler was at work between then and 1255.

Whether the original compilation would tell us much of medieval Scots law is an open question, since as yet we have neither an adequate printed text nor a scholarly study of the law of RM. In the course of other work[8] the present writer has too often stumbled over this inert problem: what was the original RM and when was it compiled? From an acceptance of the answers of Lord Cooper and Mr. Richardson, the writer moved to doubts, to investigation and to new conclusions. It seems fairer to publish the evidence for these conclusions, leaving them open to attack, and thus to stimulate interest anew in the medieval RM, than to hoard unpublished notes in the hope (certainly vain) that one day they will be used for a new edition. This is the apology for tinkering yet again with the problems of RM.[9]

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[7] RM ed. Cooper, p. 1.

[8] In particular, work on the registers of brieves. It may not be out of place to say here that Lord Cooper's dating of these registers (in *Registers of Brieves*, Stair Society, vol. 10, 1946) is untrustworthy. Thus Dundee was not sacked in 1385 (*ibid.* p. 19).

[9] I should like to thank very warmly Mr. John Buchanan, who generously discussed RM with me, and loaned to me his transcript of the Cromertie MS. with a collation of the Bute MS.; also Edinburgh University for meeting the expense of the purchase of a microfilm of British Museum Additional MS 18,111.

I

The manuscripts and the text

The manuscripts are listed in Mr. Buchanan's article [10] and in the table of authorities in volume I of *Acts of the Parliaments of Scotland.*[11] The earliest manuscripts hitherto known are the Bute [12] and Cromertie [13] (hereafter referred to as Bute and Cromertie), but to these may be added British Museum Additional MS. 18,111 (hereafter referred to as Addit.), which has long lain unidentified though it is mentioned in the printed *Catalogue of Additional Manuscripts.*[14] An examination of these manuscripts shows that Addit. represents the earliest known version of the text (though it may not be the earliest manuscript) and that with its help considerable steps can be taken back from the Record edition (itself based on Bute, Cromertie and some other manuscripts) to the *Urtext* of RM. In the chapters shortly to be discussed the evidence that Addit. is to be preferred may not seem absolutely certain in each case. But the cumulative evidence of all the chapters is clear: Addit. represents the earliest known version.

II c. 14 in the Record edition is found in Addit., Bute and Cromertie (and in a majority of later manuscripts) in IV between c. 41 and c. 42. It is a native law or assize (whether apocryphal or not is irrelevant here), and, with the exception of a few chapters included in book I, all the native laws are found in IV, to which it can accordingly be assigned.

II c. 40 is made up of a passage from Glanville (§1; II c. 45 in Cooper's edition) and a passage from the English treatise *Prerogativa Regis* (§2; II c. 46 in Cooper's edition). Paragraph 2 does not appear in Addit. It is a marginal addition in Bute but has a place in the text of Cromertie. It was certainly no part of the original compilation.

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[10] pp. 218–219.

[11] *A.P.S.*, i, pp. 181–210.

[12] In the possession of the Marquess of Bute.

[13] National Library of Scotland, Adv. MS. 25.5.10.

[14] For the years 1848–1853 (published 1868), pp. 78–79. The MS. is in fact at least two manuscripts bound together, the first ending after the 1318 statutes and before Quoniam Attachiamenta. (The *Catalogue* seems to be in error in including QA in the first part.) The first part, which includes RM, is in one hand which seems to me to be of the mid- or later fourteenth century. But such a judgment is subjective and the *Catalogue* attributes it to the fifteenth century.

II c. 49 is followed in Cromertie and two later manuscripts by a chapter derived from the treatise of Bracton. The Bractonian passage does not occur in Addit. or Bute, manuscripts not available to Mr. Buchanan, and we must go against his view that " it is probable that it was accepted as an integral part of Regiam." It must be rejected as an interpolation.

IV c. 12 §§3, 4, 5, are not found in Addit. and Bute, and their opening words, " Nota quod si . . ." suggest a gloss which has crept into the text.

IV c. 24 §§2, 3 are similarly to be rejected for they are not to be found in Addit. and Bute. They occur in Cromertie but are preceded by a marginal " Nota," evidence that they are glosses which have been incorporated. Addit. and Bute are here much closer to Skene's text than to the Record text, and they justify the following arrangement, the references here being to the Cooper-Skene editions: IV c. 22 §§1, 3, 4, 2, 5, 6.

IV c. 26. The paragraphs of this chapter are reversed in Addit. and Bute, but here as often elsewhere the Record text follows Cromertie.

IV c. 45–58. These chapters occur in the following order in three manuscripts: —

Book IV	Addit.	Bute	Cromertie
45	180	180	45
46	–	192	53
47	181	181	46
48	182	182	47
49	183	183	48
50	184	184	49
51	185	185	50
52	186	186	51
53	191	191	52
54	–	–[15]	54
55	187	187	55
56	188	188	56
57	189	189	57
58	190	190	58

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[15] At this point the table in *A.P.S.* i, p. 240 goes astray.

It is plain from Bute and Cromertie that c. 46 followed c. 53, and, on the evidence of Bute, cc. 53, 46 might be the last two chapters of RM. However in Addit., c. 190 (IV c. 58) is followed by the words " explicunt constitutiones . . . *per* Dauid regem " (*i.e.*, " here ends RM ") and then by c. 191 (IV c. 53) and a chapter, untraced elsewhere, in continuous numeration. Thus IV cc. 53, 46 were not in the original compilation. The absence of c. 54 from Addit. and Bute is also good evidence for rejecting that chapter, and we are left wondering whether in view of the rearrangement which has gone on in these manuscripts between c. 52 and c. 55, the last four chapters (cc. 55–58) might not be an addition to the original text. These chapters are a unit—the Laws of Brets and Scots—which may have been copied, as a separate treatise following RM, into a manuscript which was the common ancestor of Addit., Bute and Cromertie. In the case of Addit. and Bute, they had found their way into RM before the addition of IV c. 53. In the case of Cromertie, IV cc. 53, 46, 54 (in that order) had been tacked on to the end of RM before IV cc. 55–58 were added to it. But this is not the only possible explanation, and the question of the right of the Laws of Brets and Scots to figure in RM as IV cc. 55–58 must be left open.

Further, it is well known that, in III c. 22, a passage from Glanville has been elided at some point during the composition or transmission of the text of RM. The latter reads: " *contingit autem quandoque tenementum peti pro victoria.*" After *peti* some thirty-six Glanvillian words are omitted, and the final *evictorem* of Glanville becomes the meaningless *pro victoria* of RM. In Addit. the text on ff. 55v and 56r is written much more carefully and formally than the rest of the manuscript, though all are probably by the same hand. On turning over folio 56 to write on the verso, the scribe reverted to his current hand. This turn occurs between *peti* and *pro victoria.* If we knew why the scribe had experimented with a very formal hand for two pages, we might have an answer to the questions which suggest themselves:—was the scribe of Addit. responsible for dropping thirty-six words? Or was he carefully copying (page for page at this point) an antecedent manuscript whose scribe had elided the words? It is certainly difficult to believe that the coincidence of *peti/pro victoria*, the turn of the folio, and the change of hand was a chance one. But again the precise explanation must be left an open matter.

The effect of the textual changes proposed is to remove such few sign-posts to the date of RM as have hitherto been recognised. It will generally be agreed that RM was compiled after 1240 (on the basis of evidence provided by Mr. Richardson) and before 1400 (the approximate date of the earliest manuscripts). But we have rejected II c. 40 which comes from *Prerogativa Regis*, a text dated 1255 or later. We have rejected the sections derived from Bracton, and with IV c. 53 we have rejected the one piece of putative legislation of Alexander II [16] which occurs in RM. It must be said that this last chapter is unlikely to have been written down at so early a date as 1230, and is very unlikely to have been promulgated by any king.

Secondly the above changes pose more acutely the the problem of the process of compilation. According to Lord Cooper,[17] RM falls into three parts:—

(a) to II c. 14, Glanville fully edited

(b) II c. 15 to IV c. 8, Glanville lightly revised omitting the writs

(c) IV c. 9 to the end, native laws.

Now we have pointed out that II c. 14 belongs properly to book IV. Accordingly part (a) should end with II c. 13; but this chapter is Glanville *totally unrevised*, and includes even the Glanvillian writs. Thus at the break between full and light revision, there occurs a section with no revision whatsoever. No explanation can be suggested here; but it does seem that the writer of RM did not suffer from waning interest. He was evidently interrupted at his task.

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[16] Alexander II c. 9; *A.P.S.* i, p. 401.

[17] RM ed. Cooper, p. 21.

II

Regiam Majestatem and the native laws

By " native laws " we mean those assizes attributed to various kings of the twelfth and thirteenth centuries, and those short chapters on a wide variety of subjects which seem to have been gathered by lawyers and were not attributed to particular kings. The editor of the assizes is faced with an appalling task ; so much is clear from the desperate straits to which Thomas Thomson and Cosmo Innes were driven.[18] Faced with laws which from internal evidence could be dated to one reign, but were assigned by manuscripts to other reigns, they must have realised that an ascription of this kind was worthless where there was no internal evidence as to the date of the assize. Their editorial decisions may ultimately prove to be broadly justifiable, but a modern editor could never utter that cry of despair which is *Fragmenta Collecta.*[19]

Thus the Record edition numbers forty-two chapters in the assizes of William. None of the manuscripts attributes any of the first fifteen chapters to William, though two of these fifteen chapters can be dated from simple internal evidence to that reign. Twelve manuscripts have " Assizes of William " in ten or more chapters, with slightly varying gaps, and twelve of these chapters figure in the Record Assizes of William. Twenty-two chapters of the Record Assizes of William are attributed by all manuscripts to David I (or II) or Alexander II, but even in these attributions the manuscripts are not agreed. The last seven chapters of the Record Assizes of William have no manuscript authority, but are taken from Skene's *Acts*, and one chapter (23) has the authority of only one (the earliest) manuscript. In addition, a number of chapters of the same Record Assizes figure also in some manuscript texts of Quoniam Attachiamenta, and in all manuscript texts of

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[18] In *A.P.S.* i.

[19] *A.P.S.* i, p. 719–754.

RM. To say that an Assize of William in the Record edition figures also in RM is to tell the reader nothing.

Of the manuscript collections of Scots law only one, the Berne MS., belongs to the thirteenth century, for it was written between 1267 and 1272.[20] The main items are a Glanville and a Register of Writs. Among the final, Scottish, items are *Leges Scotie* (referred to here as Berne LS) in 22 chapters. Thomson printed nineteen chapters among the Assizes of William, one in the Statutes of Alexander II, one as the French text of the Laws of Brets and Scots, and one, undatable from internal evidence (as many others are), in *Fragmenta Collecta.*

The second law collection, the Ayr MS, was originally two separate manuscripts.[21] Part 1, the first six folios, is a collection of laws in thirty-nine chapters, the first page illegible. There is nothing in this part to date it except the hand, which seems to be of the earlier fourteenth century. It is here referred to as Ayr Misc.

Apparently of much the same date is part 2 of the Ayr MS, more substantial, and perhaps preceded at one time by a text of RM. Among other matter it contains the assizes of David I in forty-four chapters. These were printed by Thomson among the laws of David I, William and Alexander II.

The Ayr Misc. has no title that is legible, but the significance of the titles of the other two collections should not be missed. The arbitrary ascription, in these and other manuscripts, of laws which can be dated from internal evidence, to kings who cannot have issued them, shows that there was no written tradition of groups of laws issued by David I, or William, or Alexander II. The written evidence shows quite clearly that the earliest collections knew only a miscellaneous group of assizes which, for want of better knowledge, were ascribed to David I. This ascription meant no more than that they were good old laws. It was a later age which tried to unscramble them and ascribe them to other kings, and which added chapter upon chapter to these assizes. As a tentative conclusion we may suggest, on the evidence of the manuscripts, that the process of separating the laws and assigning them to various kings began in the fourteenth century.

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[20] *A.P.S.* i, p. 177–8.
[21] *A.P.S.* i, p. 179–181.

In consequence we cannot accept the simple statement that the laws of William or David I are to be found in RM, for the treatise was certainly compiled a good long time before Thomas Thomson concocted those groups of assizes from the materials at his disposal for the record *Acts of the Parliaments of Scotland.*

In the heavily revised part of RM, from the beginning to II c. 12, there are a few assizes. After dealing with a claim to land upon a brieve of right, the text turns to the question of warranty, and introduces a long passage on warranty of goods (I cc. 15–19) which is found as Assizes of William cc. 3, 5, 17, 18, 4. Book I c. 22 contains a native law which has not been traced. Book II c. 9 contains sections from a native law some of which recur in IV c. 29, but they have no known parallel in the assizes. II c. 14 should find its place in book IV.

The main collection of native law is in book IV, from c. 9 to the end (c. 58). Most of these chapters can be found also in the assizes of David I and William, or (cc. 55–58) in the Laws of Brets and Scots. But as we have shown, the assizes of David I and William cannot have been the source of these passages, for these groups of assizes did not exist as such at the time RM was written.

An examination of the collation table given by Cosmo Innes,[22] shows that a remarkable number of the native laws in RM seem to occur either in Berne LS or in Ayr Misc. and this impression is strikingly reinforced when certain omissions from his table are filled.

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[22] *A.P.S.* i, pp. 240–241.

RM	Berne LS	Ayr Misc.
I cc. 15–19	1–3, 14, 17	
IV c. 9	4, 5	10
IV cc. 10–14	7, 8, 10, 11, 13, 15, 16	
IV cc. 16–24 § 1		8, 12, 4, 11, 5, 5, 6, 13, 38
IV cc. 26–34		15, 14, 16, 17, 18, 21, 22, 19, 20, 23
IV cc. 37–44		29, 30, 32, 31, 24, 33, 35, 36, 26, 25
IV cc. 47–51		9, 37, 34, 27, 28
IV cc. 55–58	22	
II c. 14 should follow IV c. 41		39

Certain chapters in RM which have the form of native assizes do not seem to occur in any collections of native laws. These are I c. 22; II c. 9 (part); IV c. 12 (part); IV cc. 25, 35, 36, 45, 52, 54. In addition a few chapters occur in later collections as royal assizes, but are not found in Berne LS nor in Ayr Misc. These are IV c. 15 (Ass. Will. c. 1); IV c. 24 (not § 1) (Ass. David c. 22); IV c. 46 (Ass. David c. 32); IV c. 53 (Alex. II, c. 9). Of all these passages from RM we can immediately dismiss IV c. 12 (part), c. 24 (not § 1), cc. 46, 53, 54, which, as we have shown above, formed no part of the canon of RM. The only native assize which is in RM, is not in either Berne LS or Ayr Misc., and is in later law collections, is Ass. Will. c. 1 (RM IV c. 15). All the other native laws in RM are found in either Berne LS or Ayr Misc., with the following exceptions, for which no source can be found: I c. 22; II c. 9; IV cc. 25, 35, 36, 45, 52.

Clearly with these two native collections we are very close to the collection or collections used by the author of RM. This is particularly striking in the case of Berne LS, where the verbal differences show that the extant Berne MS cannot have been used to compile RM, but where the chapter sequences show that something close to it was used. This point is well brought out by comparing the sequence of chapters in RM, Berne LS and (since Berne LS and the Ayr Misc. dovetail, overlapping in only one chapter of RM) the assizes of David in part 2 of the Ayr MS. RM IV cc. 9–15 occur in the Ayr MS part 2 assizes of David as cc. 34, 5, 1, 17, 26, 27, 4. The same chapters (RM IV cc. 9–14) occur in the Berne LS as cc. 4, 5, 7, 8, 10, 11, 13, 15, 16; clearly the Berne LS is closely related to RM while the Ayr MS assizes are not. The chapter sequence of Ayr Misc. is rather more disordered when compared with corresponding chapters in RM, but in places the sequence is close as, *e.g.*, in RM IV cc. 26–34. As a small point in illustration of this, it may be noted that the two Record edition paragraphs of IV c. 26, which occur as Ayr Misc. cc. 15, 14, should on the evidence of the manuscripts of RM be reversed, when their order becomes the same as that of Ayr Misc. The use of a source close to these two early law collections (Berne LS and Ayr Misc.) is made certain by the fact that a substantial minority of the chapters in Ayr Misc. did not find their way into any later law collection. That is, texts of the Ayr Misc. assizes were not widely diffused, but nonetheless chapters from these assizes were used by the compiler of RM.

The conclusion of this argument is that the compiler of RM used a collection or collections of native laws close to Berne LS and Ayr Misc. But it is also a conclusion that the presence or absence of " early " assizes, or any particular " early " assize, from the text of RM tells us nothing whatever about the date at which RM was compiled.[23]

III

Regiam Majestatem and the statutes of 1318

The legislation of 1318 [24] is on quite a different footing of authority from the early assizes. Save for the last two chapters its date and authenticity are unquestioned.[25] Accordingly it should be a matter for serious consideration when we find that RM I c. 10 repeats the context and many of the words of 1318 c. 19. Unless there is a satisfactory alternative explanation, based preferably on evidence but alternatively on reasonable probability, we must reach the logical conclusion that RM was compiled after 1318. Lord Cooper saw the problem, and we must consider his arguments first.

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[23] *Cf.* the discussion in RM ed. Cooper, pp. 23–27.

[24] *A.P.S.* i, pp. 466–474.

[25] This refers to the Latin version. *A.P.S.* i, p. 474 c. xxix is an accretion and *ibid.* c. xxviii may be so too.

" Is it possible that if the compiler . . . was working after 1318 the only legislative material which he could discover since [1214] should have been this solitary chapter [1318 c. 19]? "[26] This question has already been answered—in the affirmative. The statutes of Alexander II were not known to the compiler, but Lord Cooper would not use that as an argument for dating RM before 1214.[27] This " solitary chapter " must have been an interpolation, he thought.

Lord Cooper further asked why, if the compiler had known all the legislation of 1318 (as he almost certainly did), he selected only " this comparatively unimportant provision." A simple answer can be found from an examination of the statutes themselves. There are only two, or at most three, chapters which are relevant to the revised portion of RM. And the omission of one or two of these two or three scarcely amounts to an argument. It might be argued that the whole of the legislation should have found a place in RM IV, where the assizes are collected. This is only an hypothesis, to which it can only be answered hypothetically that, as the 1318 legislation was published in the form of royal letters and was apparently widely known and diffused, there was no good cause for appending it to RM. The compiler could reasonably expect that it would already be in the hands of those fellow practitioners for whom his treatise was doubtless intended.

Lord Cooper realised that, in addition to his rhetorical questions, some positive explanation was required for the presence of passages from 1318 c. 19 in RM I c. 10. He argued that it was an interpolation made almost a century after the date of composition proposed by him. And he offered the alternative argument that the two chapters, one in RM, the other in the 1318 statutes, have a common source.

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[26] RM ed. Cooper, p. 25.

[27] However he does use it in one place as an argument to push the compilation back before c. 1225; RM ed. Cooper p. 25.

To answer these suggestions is difficult since they carry no supporting evidence. There is an initial difficulty: that interpolations postulate the copying of a text. And so we should require to believe that RM, a lawyers' handbook written for the thirteenth century and relevant to conditions then (as Lord Cooper argues) lay unused and little copied (for no copy has survived) until the fourteenth century. Then a statute of Robert I was interpolated (though no manuscript shows this to have been the case) and subsequently, as the manuscripts do show, interpolations were made of thirteenth-century English material. Such a view would seem to demand a careful examination of the wording and context in which the statute of 1318 is quoted.

After the introductory chapters, which deal with the competence of various courts and are modelled on Glanville, book I c. 5 deals with the proper means for securing a summons for deforcement of land. The chapter is original to RM. It leads logically to I cc. 6–7, taken from Glanville, and dealing with the delays and essonzies allowed to the defender. Book I c. 8 then deals with the view of lands, if demanded by the defender, and is substantially Glanville. It ends, however, with a new section, that the view must follow the bounds laid down in the brieve of right, and that the pursuer need take no further steps on the day of the view. To do so is to fall into *stulta responsio*. The action is brought to court after these preliminaries in I c. 9, which is new and contains the pursuer's statement of claim placing himself upon the assize. The obvious consequence would be the statement of the defender's answer, but first the defender is warned after the words of 1318 c. 19 to use all his preliminary opportunities:—

RM I c. 10	1318 c. 19
Perlecta autem litera domini	Item in brevi de recto quod nullus
regis de recto, non habeat	tenens de cetero aut suus
tenens necesse ad defendendum	prolocutor habeat necesse defendere
ius petentis quando lectum est	ius demandantis ad primam lecturam
breve de recto nec aliquid dicere	brevis de recto nec aliquid dicere
nec respondere ad narrationem	quamdiu
petentis quousque petens vel	demandans aut
suus prolocutor versus	suus prolocutor habeat adversus
tenentem totum perdixerit	illum predictum seu
vel clameum suum narraverit.	percunctatum.
Nec tenens nec suus prolocutor	Nec tenens nec suus prolocutor
sint per aliquam exceptionem	sit calumpniatus sicut
petentis calumniati nec per	indefendens nec
aliquem ballivum amerciati	amerciatus
dummodo dictus tenens vel suus	quamdiu
prolocutor defendat iniuriam vim	defendat iniuriam et
aut iniustam deforciamentum ac	deforciamentum et
ius ipsius ante exitum suum de	ius demandantis ante exitum illorum de
curia ad consulendum se ulterius	curia. Similiter
super dicendis. Nec in brevi de	nec in brevi de
morte antecessoris nec de	morte antecessoris
recognitione (quod quidem breve idem	
est et habet eundem intellectum)	
nec in brevi de nova	nec in brevi de nova
dissasina habeat tenens seu	dissasina habeat tenens vel
prolocutor suus necesse ad	suus prolocutor necesse ad
defendendum iniuriam vel	defendendum iniuriam vel
iniuriosam detentionem nec	iniuriosam detentionem nec dissasinam
aliquid dicere sed sine aliqua	nec aliquid dicere antequam
responsione simpliciter audire	
brevia domini regis predicta et	breve perlegatur, sed audito brevi
postea respondere ad melius quod	postea respondeat pro parte sua
intellexerit ... tam contra breve	quod sibi bonum visum fuerit.
... quam contra clameum petentis.	

RM I c. 10 continues in the following way:—Accepta licencia ad procedendum extra curiam ad consilium, et hoc habito, scilicet consilio,[28] ad introitum curie defendet tenens iniuriam vim et iniustam deforciamentum. Et tunc incipiet tenens primo proponere exceptionem contra breve . . . si habeat aliquam . . . proponendam . . . . Et si omittat excipere contra litteram et proponat aliquam exceptionem contra clamium petentis, tunc affirmat dictum breve esse validum . . . . Et si ulterius excipere voluerit contra dictum breve, non erit super hoc de cetero audiendus.

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[28] This is the reading of Addit. at fo. 11r, and makes the best sense. The word *consilio* is interlined. Bute reads "ad consulendum, hoc habito scilicet consilio" with *hoc* deleted, presumably because *consilium* has been changed to *consulendum*. Cromertie has "ad consulendum, habito super hoc consilio," which is a corruption.

It is no less plain than a pikestaff that there is no interpolation, whether of the statute or of a similar maxim, into the text of I c. 10. The words of the statute are part of the argument, part of the grammar and syntax of RM and to remove them, or any part of them, would make nonsense of the whole. Interpolations are not to be multiplied beyond necessity.

The statute has been redrafted so that it will fit in with the argument and style of RM. *Demandans* becomes the Glanvillian *petens; predictum seu percunctatum* which is characteristic of the 1318 statutes, is dropped; the phrase *antequam breve perlegatur* in the last sentence of the statute becomes the opening *perlecta litera* of RM. Most of the changes from the statute to RM are expansions.

The statute is not merely hortatory. It has a point. The proponing of defences was a difficult and technical business, requiring care and thought. If the defender was compelled to answer the pursuer's claim immediately after the brieve of right was read out, then he would perhaps spoil his case. And he might be forced to make such an immediate answer, if the judge treated a request for time to take counsel as a failure to answer the plaint, and either amerced the defender, or even gave judgment against him. In the case of actions on brieves of mort ancestor and novel dissasine it seems that the defender might be compelled to answer the pursuer's case even before the reading of the brieve. The statute forbade the judge to exercise such compulsions upon defenders. It protected the right of the defender to take counsel before answering. It dealt with actions on brieves of right, and then on brieves of mort ancestor and novel dissasine.

Now this is not quite the point of RM I c. 10, which merely seeks to advise the defender as to his opportunities. It does so in the words of the statute, and where that is not explicit, as in the final " quod sibi bonum visum fuerit," RM expands into an explicit statement. But the compiler realised at this point, when dealing with mort ancestor and novel dissasine, that although he had advised the defender to use his opportunity to take counsel, he had not explained clearly the need to propone exceptions to the brieve, exceptions to the claim, and the answer to the claim, in that order. Thus in the whole chapter he opens with the brieve of right and the advisability of taking counsel, passes to those of mort ancestor and novel dissasine and the advisability of taking counsel, mentions exceptions on these latter brieves and then returns to explain the necessary sequence of exceptions for the brieve of right. This cumbrous and circuitous treatment is to be explained only on the assumption that the statute of 1318 c. 19 was being followed, for it does not deal with exceptions. The compiler blundered into the subject through expanding the words " quod sibi bonum visum fuerit " of the statute.

Indeed the treatment of the subject of mort ancestor and novel dissasine is the most convincing argument for the use of the statute. For these brieves had not so far been mentioned in RM, and a discussion of pleading on them was wholly out of place in this chapter. That it does occur proves conclusively that the model of 1318 c. 19 is being followed.

This statute is one of seven chapters in the 1318 legislation which are concerned with the same point—that the facts of the pursuer's case must be fully stated, either in the brieve or in the pursuer's claim, before the defender is compelled to answer. The rule is provided for in various kinds of action, not all begun upon a brieve. The detailed character of these chapters (cc. 13–19) shows that something new was being attempted. The words " de cetero " in c. 19 strongly suggest that this was the case; in c. 13 a change from previous practice is made quite explicit. There is in fact no argument in favour of the suggestion that 1318 c. 19 and RM I c. 10 had a common source in some lost assize, buried in a lost lawyer's collection. 1318 c. 19 belongs to a larger whole, and to conjure up some assize or maxim to explain the close verbal similarities between it and RM I c. 10 is in effect to demand a similar assize or maxim for the six related clauses of the 1318 statutes. Moreover it is to ignore the really significant point about the use of the statute in RM—that it involved the compiler of RM in difficulties and irrelevancies.

It is the conclusion of this study that after 1318 and before *c.* 1400 a Scottish lawyer began work on Glanville's treatise to adapt it for use in Scotland—that RM as we have it is a fourteenth-century compilation. It is not correct to argue that since Bracton, Britton, and other English treatises were not used, therefore RM must have been compiled before they were. Such an argument rests on the premise that they would have been adaptable to Scottish purposes, that Scottish and English law in the reign of Edward I had much in common. There is no evidence for such a premise.

Since one group of RM texts incorporates a section of Bracton, another a few sentences from *Prerogativa Regis*, since Bute and Cromertie are covered with glosses from canon and civil law and Cromertie has references to the Summe of Hengham C.J., all these undeniably the insertions of fourteenth-century users of RM, it follows that these users had some acquaintance with English, canon and civil law. It is correct to argue that the compiler of RM found that the law described in Glanville had much in common (at least in forms) with the law of Scotland. And if RM belongs to the fourteenth century, then it is surely correct to deduce that Glanville had more in common with fourteenth-century Scots law than did Bracton or the Edwardian writers on English law. In other words we may not use the law to do violence to the date of RM. We must use the date of RM to elucidate the history of Scots law.

If these conclusions are accepted, then much that has been written must be unsaid. But the outlines of the traditional account of medieval Scots law may still be correct: that Scotland was developing in the twelfth and thirteenth centuries a simpler and less rigid version of English common law; that much of this was shattered during the struggle for independence; that in the fourteenth century men tried uncertainly to rebuild the vanished structure, taking for their materials whatever came to hand, whether indigenous or foreign. Glanville reshaped as *Regiam Majestatem* was part of that new structure.

A. A. M. DUNCAN.

JOHN MILLAR, PROFESSOR OF CIVIL LAW AT GLASGOW (1761–1801)

MOST readers of these pages will perhaps never have heard of John Millar, Professor of Civil Law at the University of Glasgow from 1761 to 1801. A few may remember him as in one way or another associated with Adam Smith and with Lord Kames, or with the early parliamentary reform movement, in which the well-known martyr Thomas Muir, one of Millar's former students, also figured. Readers acquainted with David Murray's *Memories of the Old Glasgow College* (Glasgow, 1927) will have a somewhat clearer picture of the man since he received considerable attention at the hands of this student of things juridical in Scotland. Few, indeed, except for a few scholars professionally interested in such matters, will ever have dusted off the covers or thumbed through the pages of his writings, long since gone almost completely out of sight.[1]

Yet in his day the name of Professor Millar was a name to charm with, or, as in the case of the father of Francis Jeffrey and many others of the Tory persuasion, on the political side, a name of execration. Politically Millar was a controversial figure. Our interest in this paper, will, however, be focused neither on his political activities nor on his contributions to social and political theory, which were considerable, but on his labours in the field of law and law teaching.

Before Millar's appointment in 1761 to the Regius Chair of Civil Law at Glasgow, this was hardly a post of distinction. In spite of the scholarly labours of William Forbes (*Institutes of the Law of Scotland*, 1722–1730), who occupied the newly constituted chair from 1714 to 1745, and of the able work of Hercules Lindesay, substituting for and later succeeding Professor Crosse (1746–1750), who seldom lectured at all, the law class seldom had more than four or five students.[2] However—

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[1] See, however, W. C. Lehmann, "John Millar: Historical Sociologist," *British Journal of Sociology*, March 1952, pp. 30–46; Duncan Forbes, "Scientific Whiggism: Adam Smith and John Millar," *Cambridge Journal*, Vol. VII, pp. 643–670; W. C. Lehmann, *John Millar of Glasgow (1735–1801): His Life and Thought and his Contributions to Sociological Analysis*, Cambridge, at the University Press, 1960.

> " from the moment of [Millar's] appointment there was a general expectation that Millar would greatly improve, in this branch of education, the character of the university; but I believe his most sanguine friends never entertained the idea that he could possibly raise it to that degree of celebrity which it soon attained. The improvement, in a few years, became so rapid: he had frequently about forty students of Civil Law; while those who attended his Lectures on Government, often amounted to a much greater number." [3]

" It was to hear his lectures," a contemporary visitor to Glasgow tells us, " . . . that students resorted hither from all quarters of Britain. . . . Glasgow is, in short, famous as a school of law as Edinburgh is as a school of medicine." [4]

> " On his account," a later, but an informed, and we have no reason to believe a biased, witness tells us, " the University of Glasgow was attended by all the most talented and distinguished of the high Whig aristocracy, among whom attendance upon the lectures of Professor Millar was regarded as a necessary portion of sound political education. He may be considered as having formed the minds of many of those who have been distinguished in the political world on the liberal side during the last fifty or sixty years." [5]

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[2] The distinguished Viscount Stair (*The Institutions of the Law of Scotland*, 1681) had also taught at Glasgow with distinction and it is here that was probably laid the groundwork of his *Institutions* (David Murray, *op. cit.*, pp. 118 *et seq.*). But this was in the capacity of a " Regent," the law chair being then practically non-existent.

[3] John Craig, " An Account of his Life and Writings," prefixed to John Millar, *The Origin of the Distinction of Ranks*, 4th ed., Edinburgh, 1806.

[4] R. Heron, *Journey through Western Scotland in 1792*, Perth, 1793, Vol. II, p. 418.

[5] J. H. Gray, *Autobiography of a Scottish Country Gentleman*, Edinburgh, 1868, pp. 22–30.

Of the strict historical objectivity of the following statement, which incidentally tends to move Millar out of the field of strict law into that of politics, we cannot be quite so sure, but it is at any rate significant as reflecting the esteem in which his memory was held even by an after-generation. A reviewer in an *Edinburgh Review* of a later day has this to say in a review of the life account of one who had come under Millar's influence (Charles Bell):

> " In vain did the exacting spirit of conformity to the tenets in vogue brood over Scotland, while session after session, to fresh relays of eager and delighted listeners, John Millar's eloquence fixed deeply in their minds the principles of free constitutional government. His class thus became a great training school for the lawyers and statesmen of the next generation; and many of them in after life owned that Millar's prelections had first given the impulse which stimulated them throughout life. . . . There can be no question that the bold lines of thought on which the *Edinburgh Review* was afterwards constructed, were first laid down by his masterly hand." [6]

That James Mill should have considered Millar's lectures " among the most instructive things that ever were offered to the minds of youth "; that John Rae in his definitive biography of Millar's master should have considered the pupil himself " the most effective and influential apostle of liberalism in Scotland in that age "; that David Murray, already mentioned, should have considered him " the most celebrated and successful teacher of his time "; and that so careful a scholar as the late W. R. Scott should have been in essential accord with these evaluations—these are certainly most interesting facts to note. But much more telling, in reality, is the record of Millar's students who later made their mark at the Bar, on the Bench, in positions of state, and in some cases as authors and teachers.

Of such students of distinction we can here name only a few. Among the most distinguished was David Hume, later Baron of the Exchequer, whose uncle, the better-known historian and philosopher, sent him to Glasgow for the explicit purpose of studying under Millar after being assured that he might also enjoy the professor's private tutorship as a " resident student " in his home. On Baron Hume's contributions to Scots law and to criminal law generally at the University of Edinburgh no comment is necessary here. Another scholar of distinction from among the ranks of Millar's students was Thomas Thomson, known particularly for his researches in the parliamentary records of Scotland. Of him Lord Cockburn says, in his life of Jeffrey, that he was " the most learned and judicious antiquary in Scotland. No one has done nearly so much to recover, to arrange, to explain and to preserve our historical muniments. His real merit, great as it may seem now, will seem still greater five hundred years hence." Thomson was, by his own testimony, decisively influenced by Millar.

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[6] *Edinburgh Review*, Vol. 135 (1872), pp. 460 *et seq.* (art. Charles Bell).

Of men of affairs the most distinguished was undoubtedly William Lamb, second Viscount Melbourne, counsellor to the young Queen Victoria, Prime Minister of the realm for eight years, first under William IV, then under Queen Victoria herself. He, too, was sent to Glasgow for the explicit purpose of studying under Millar after he had completed his studies at Cambridge, and only after Lady Melbourne had been assured through the offices of the Earl of Lauderdale that William and his brother Frederick might also enjoy Millar's tutorship as resident students in his home. The young but quite mature Lamb came at the time strongly under the professor's influence. Another of his students destined to prominence in affairs, but also distinguished as an author, was James Maitland, eighth Earl of Lauderdale, ardent supporter of Fox and opponent of the younger Pitt, leader in the Parliamentary Reform movement and supporter of Wilberforce in the anti-slave-trade movement. He, too, was a resident student in Millar's home, and the two developed a life-long friendship.

Many others could be mentioned, such as Lord Reston (David Douglas, nephew of Adam Smith), Lord Craig, Sir James Moncreiff, George Cranstoun, William Adam, who stood high in the King's Council at Westminster, and many others prominent in the legal profession, in diplomatic circles, and elsewhere in public life.[7] We cannot forgo naming here one other, the future poet Campbell who has given us this interesting testimony:

> " I heard him when I was but sixteen lecture on Roman Law. A dry subject enough it would have been in common hands; but in his hands Heineccius was made a feast to the attention."[8]
>
> And again, " Millar had the magic secret of making you so curious in inquiry, and so much in love with truth as to be independent of his specific tenets. Every lecture that he gave was a treat from beginning to end. . . .
>
> " The impulse which Millar's lectures had given to my mind continued to act long after I heard them. . . . Poetry itself, in my love of jurisprudence and history, was almost forgotten. . . . At that period [of his Highland tutorship] had I possessed but a few hundred pounds to have subsisted upon in studying law, I believe I should have bid adieu to the muses and gone to the bar. . . ."[9]

All this may sound like indulging our personal interest in the man; in reality it is not without bearing on his contributions to the science and teaching of the law, or more broadly of jurisprudence. What are the salient facts, first of all, relating to his expounding of the law as occupant of the Regius Chair of Civil Law at Glasgow that may still be of interest to the student and practitioner of the law today?

Millar was elected to his chair in 1761 at the very early age of twenty-six, just a year after his admission to the Bar at Edinburgh, and held this position until his sudden death in 1801, still apparently in the prime of his vigour at age sixty-six. His candidacy for this office was supported by Adam Smith, who had " discovered " this promising young man in the first classes to which he lectured at Glasgow, in 1751, and who always included considerable material on general jurisprudence in his course in " moral philosophy "; and by the distinguished jurist, one of the judges of the Court of Session, Lord Kames, author, among many other writings, of *Remarkable Decisions*, *Principles of Equity*, *Historical Law Tracts*, *Elucidations Respecting the Common and Statute Law of Scotland*, in whose home he had served for two years as tutor to his son. Kames had presumably been responsible for the young lawyer's appearance to argue cases not only in the Outer but even in the Inner House of the Court of Session, that is, before the full assembled judges, an honour that was usually accorded only to lawyers of much wider experience at the Bar.

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[7] D. Murray, *op. cit.*, pp. 221 *et seq.*

[8] Cyrus Redding, *Literary Reminiscences and Memoirs of Thomas Campbell*, London, 1860, Vol. i, pp. 158 *et seq.*

[9] Wm. Beattie, *Life and Letters of Thomas Campbell*, London, 1849, Vol. i, pp. 157–160.

For forty years he lectured, apparently without much change in general programme, first of all on civil law, that is on the Roman law according to the *Institutes* and the *Pandects* of Justinian, which was considered the " proper business of the chair "; but also every second year on the law of Scotland, and in his last few years, alternating with this, on the law of England. In addition he gave a course of lectures every year on public law, or what he called the " principles of government," already referred to above. Part III of this latter course of fifty or so lectures was addressed to " the present state of the English government," being in reality a review and analysis of the British Constitution—the make-up of Parliament, the powers and privileges of its several branches, the popular representation in the House of Commons and the manner of election thereto, the judicial establishments, both civil and ecclesiastical, and their procedures, as they differed somewhat for England and Scotland respectively. This latter section of his " lectures on government" was, we believe, unique up to this time in the history of university practice anywhere in Great Britain. Blackstone's Viner Lectures at Oxford constitute only a partial exception.

All of his lectures he delivered, following the pioneering but not unchallenged experiment of his predecessor Hercules Lindesay, in English rather than in the traditional Latin, though, in view of its continued use in Bar examinations, he continued to use the Latin in examinations. His biographer believed this use of English was a principal factor in giving the Glasgow chair its strong lead over the chairs at Edinburgh in spite of the greater advantages offered by the capital city with its splendid law courts, its superior libraries and its judicial life generally.

In all of these lectures on law, civil and municipal, private and public, statutory and common, Millar was, first of all, guided by a clear conception of the nature of law as a body or system of established rules for the guidance of the conduct of men in society—individually in private law and in their collective capacity in public law—in terms not of what they ought to do—a matter of morals—but of what they can be compelled by public authority to do. His general organisation of the subject, as followed in his various courses of lectures with only such modifications as the particular subject might call for, has been summarised for us by one of his former students. Slightly abbreviated, James Reddie's statement, as applied to civil law, reads:

> "In civil law we distinguish between rights and actions. Rights may proceed from the relation of husband and wife, parent and child, master and servant, guardian and guarded or minors. Rights may also be real or personal. Real rights may be in property, in servitude, in pledge, or in personal privilege. Personal rights may arise from promise or contract, from crime or delinquency, or from equity or utility without the intervention of the two former. Actions involve the manner in which actions at law are

> commenced, procedures in determining causes, and the execution of sentences." [10]

This organisation of the subject Reddie holds to be one of the most satisfactory provided by the science of law up to this day (1847).

Though Millar always treated law in a broadly historical and comparative perspective, his basic course in the *Institutes* appears to have been largely expository and illustrative of a text used (Heineccius), merely trying to drive home and fix clearly in the student's mind the principal facts, the essential provisions of the Roman law under the various headings. In his own words, as reported in one set of student notes:

> "I [previously] endeavoured to explain the facts of the Roman law, which seems to have been the chief thing intended in the publication of the *Institutes*. In doing this I have avoided reasoning on the principles whereon their decisions are founded. [But] in going over the subject a second time [*i.e.*, in the latter part of the term, under what he called his lectures on 'jurisprudence'] I think these principles ought to be the chief consideration, and in the course of this investigation we shall be led to compare the Roman law with that of other nations. This is not done merely with a view to obtaining a knowledge of the Roman law whereby to regulate our practice—for it has no authority [with us today]—but it is valuable as it is the experience of a numerous body of lawyers, who in a large empire must have had a very extensive practice, and therefore deserves our notice as being an enlarged and improved system; and in order to judge rightly of it we must compare it with the systems of other countries and our own feelings."

His biographer put the same general idea in these words. Under jurisprudence, he tells us, he treated—

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[10] James Reddie, *Inquiries in the Science of Law*, London, 1847, pp. 345 *et seq.*

> " of such principles of law as pervaded the codes of all nations and have their origin in those sentiments of justice which are implanted in the human heart. He began by investigating the origin and foundation of each right in the natural principles of justice; and afterwards traced its progress through the different conditions of mankind; marking such deviations from the general rule as the known circumstances of particular nations might be expected to occasion, and accounting in the most satisfactory manner for those diversities in laws which must otherwise have appeared irreconcilable with the idea that there is anything stable or precise in the moral sentiments of mankind." (Craig, *op. cit.*, p. xxvi.)

In these lectures, as an examination of surviving student-notes will show,[11] an historical and comparative, or in his own language a "philosophical," method came more and more to the fore. He prefaces them with a consideration of the origin of law in the requirements of human nature and of the needs of human society, in customs and in the prevailing moral codes. Husband-and-wife relations, for example, involve a consideration of the relations of the sexes in various societies and in various stages of the development of society—among hunters and fishers, among shepherds, in agricultural societies, and in commercial and industrial societies. Polygamy is discussed in terms of its limited occurrence, of the circumstances in a society that give rise to it, its effects upon population, on morals, on the laws of inheritance and testament, etc. Parent-child relations lead to an historical review of the right of *patria potestas*, its prevalence, its absoluteness, its mitigation or abolition in various times and countries, and a discussion of the rights of children as well as of those of parents. Even problems of education, schooling, and lack of discipline are discussed under this head. Master-servant relations lead him to an historical and economic consideration of slavery, in Rome, under feudalism, in modern times, and to a consideration of the emancipation of the working classes in a commercial society in its various economic, social and political implications. And so with other topics.

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[11] A very considerable collection of student-notes on Millar's various courses of lectures will be found in the David Murray collection in the University of Glasgow Library. Others will be found in the National Library and one set in the Edinburgh University Library.

It was these lectures on " jurisprudence " that provided the principal basis for his first published work, *The Origin of the Distinction of Ranks*, which was unusually well received at the time ; as did his " lectures on government," in particular the portions dealing with Great Britain, provide the groundwork for his *Historical View of the English Government*, dedicated to Charles Fox, which has not inappropriately been called the first attempt at a history of the British Constitution.

Of his lectures on the *Pandects* the present author has little direct knowledge, though student-notes are available on them. In his lectures on Scots law, which particularly attracted students preparing for the Bar in Scotland, he would naturally emphasise the peculiarities of the laws of Scotland and of Scottish judicial establishments and practices in the various courts. Broadly, he finds that feudal establishments and feudal customs had taken a much firmer hold in Scotland than in England and had many more survivals there even in his own day. This was particularly true of land law, the law of entail and other laws governing rights of succession and inheritance. It is attributed not a little to the close ties of Scotland with France, dynastically, politically, educationally and culturally, partly out of " enmity between Scotland and England." The severity of the law in Scotland is often referred to, the great number of even minor offences still treated as capital, the stronger influence of Roman law on Scots than on English law, and the greater weight of common-law concepts in the latter. In his discussion of slavery he repeatedly touches upon the survival of slavery, even though in mitigated form, among colliers and salters in Scotland, a circumstance of which he seems to be painfully conscious. The peculiarities of Scottish ecclesiastical jurisdiction are also noted.

In his lectures on English law he would naturally draw more heavily on English authorities such as Coke and Blackstone than on first-hand knowledge of the original statutes and judicial precedents as drawn upon in his exposition of the law of Scotland. From available student-notes it appears that he gave much more time in this course than elsewhere to the historical background and development of the law. In an introductory preview he points out in particular the following peculiarities of the law of England: (1) Its remarkable precision and accuracy; (2) its derivation not so much from experience and observation as from narrow rules adapted to the time in which they were made; (3) " the vast multitude of technical phrases and terms of art with which it abounds, and these undoubtedly proceeded from the circumstance . . . that these laws took their rise from illiterate practitioners "; and (4) peculiarities of arrangement—all " practical systems of law [being] very ill arranged." Since English law is chiefly common law, its documentation will be found much more largely in the decisions of the courts of justice than in legislative statutory enactments.

So much for a characterisation of Millar's various courses of lectures on civil and municipal law and on jurisprudence generally.

How much of this was new? What contributions, if any, did Millar make to the science of law in the narrower sense, or of jurisprudence in the broader sense? Or to the teaching of both of them? These questions are not easy to answer, especially by one not himself a student of the law, and in view of the fact that Millar left little in writing on law proper.

In the first place, there was but little of a university law-teaching tradition in Great Britain at this time. Most lawyers received their training either as apprentices in private law offices or in some cases, in England, in the Inns of

Court. Some attention was, of course, paid to jurisprudence in the Moral Philosophy courses in all the Scottish universities—witness the lecture-notes, in various forms, of Hutcheson, Adam Smith, Ferguson, Beattie and others—and at King's College, Aberdeen, lectures were at times delivered on law proper ; but chairs of law existed at this time only at Edinburgh—two of them, with a third on public law more or less dormant—and at Glasgow—only one—and these were in any active way quite new. Bacon, Thomas Smith, Coke, Mackenzie, Stair had done their work outside the universities. Blackstone at Oxford was contemporary with Millar, scarcely a decade in his advance. Kames was leading the way in historical jurisprudence ; Adam Smith was broadening the subject into a " history of civil society." Otherwise there was little with which to compare Millar's work.

We can only say that his approach to the law was scholarly, informed, replete with understanding, and that when he wrote, and from the meagre evidence that is provided by student-notes on his lectures, he documented his positions with care and usually in considerable abundance from legal, historical and literary sources ; and he did much to broaden and to humanise men's conception of the law ; that he aroused an interest in its study in hundreds of students and inspired some, like Hume, Thomson, Reddie, and no doubt in a lesser way many others, to more intensive and exploratory labours in the field ; and that he raised the sights of many others to higher standards of performance and achievement in the legal profession and elsewhere in public life. Tytler in his memoirs of Lord Kames admits that " there were few who attended [Millar's] lectures without an increase of knowledge ; or who perused his writings without deriving from them much information." Ramsay of Ochtertyre, to whom we owe so many sidelights on prominent men of his time, considered Millar " a dangerous man " from his admixture of politics and " atheistic philosophy " with the law, but yet admits that

> " whatever may have been his demerits . . . it is agreed that he made many excellent scholars. In fact his general views of jurisprudence were masterly. . . . He taught civil law with great ability and diligence. In a word he is proof of what may be done by a single professor acting steadily on a fixed plan for more than thirty [actually it was forty] years." [12]

On his humanising, his vitalising of the law, and developing enthusiasm for it in his students, we may further remark that while some of this was no doubt effected by the spell of his lively and sympathetic personality, by the pains he took with his students, especially with the more promising among them, individually, in counselling, by after-lecture and fireside discussions, much of it must also have been due to his ability to combine broad scholarship and profound insight with an imaginative realisation of the bearings of his subject upon real-life situations. He was able to make the law a living, meaningful thing to his students. What student coming out of a home, as all of them of course did, could not appreciate his illustrations of family life in the case, say, of a second marriage, the rights of step-children, or half-brothers or sisters, or even of " bastards " in the inheritance of property? Or of primogeniture or entail? Or the effects of bachelordom or late marriage for men on the prevalence of prostitution in cities like London or even Glasgow? or the authority, or the limits of the authority of a father over his children? What student coming from the Scottish countryside, as most of them did, would not be interested in the problem of the responsibility of the owner of a bull for the goring of a neighbour, or of a dog for the killing of a neighbour's sheep—to what extent and under what circumstances? And so with the confusions and conflicts of Scots and English law growing out of the Union after all but recently effected.

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[12] John Ramsay, Ochtertyre MSS. (published only in part in *Scotland and the Scotsmen*), Vol. iii, p. 1860.

> “ Millar was not merely desirous,” his biographer tells us, “ to convey to his student just views and accurate information ; but he was anxious to convey them in a manner most likely to seize the attention and to produce habits of original thought and philosophical investigation ; thus rendering lectures formerly considered as useful only to lawyers the most important school of general education.” (Craig, *op. cit.*, p. xii.)

And this was after all beyond any reasonable doubt Millar’s most distinctive contribution to the study of law. He helped to lift the subject out of the realm of mere legal technicality and of a knowledge merely of legal details, ever so important of course for the practitioner, to a level worthy of a place in a university. On this, finally, we have two important testimonials to his work by men who knew him well.

In the introduction to his *Elucidations* Lord Kames takes the teachers of law in Scotland in his day severely to task for their methods of instruction. They “ husband their reasoning faculty as if it would rust by exercise,” and “ load the weak mind with a heap of uninteresting facts without giving any exercise to the judgment.” But he hastens to add in a footnote, “ I should merit censure equally to what I bestow on others, did I not except John Millar, Professor of Law in the College of Glasgow.”

That the authors of the report of the Royal Commission of Visitors to the Scottish Universities in the late 1820s had Millar specifically in mind in the paragraphs we are about to quote, we cannot of course be absolutely certain. But when we remember that they had subjected to a most severe grilling his immediate successor at Glasgow, who had departed almost completely from the Millar tradition, and had allowed his chair to deteriorate to the point where there were again only four or five students, or even fewer, in the civil law class—there were more in Scots law ; and even more when we remember that three if not four of the members of the Commission, and two further members of a sub-committee appointed for the Glasgow investigation, were former students of Millar's, this becomes almost a certainty. The report contains these paragraphs:

> " The real interests of the community may be most materially sacrificed if the course of study of law shall be adapted wholly to the supposed convenience of a portion of the students. The country is deeply interested in the character, the independence and influence of the advocates to whom the defence of their property and liberties may be entrusted; and it will be in vain to hope that the independence and character of the bar can be maintained if the study of law is not conducted on an enlightened and philosophical plan.
>
> " The great extension of the subject only renders it more important to provide that the instruction of the students shall not be limited to the details of a technical art, and the philosophy and science of law sacrificed, in order to furnish materials for the manual of a practitioner. . . .
>
> " The manner in which the subject may be taught in the universities will necessarily determine, in a very great degree, the mode in which it will be generally studied." [13]

In any event, this conception of the function of a chair of law in a university was exactly the conception held by Millar; and to the realisation of this ideal he devoted his best efforts and the full strength of a vigorous mind for a full two-score years.

A mere episode this in the law history of Scotland? Possibly so. It is true that Millar's star rose suddenly on the horizon of law instruction in Scotland, and that after his death he appears to have " gone out of sight " with almost equal suddenness. And yet, of the hundreds of students who sat at his feet during the course of many years there is good reason to believe there were dozens, at least, of men of genuine leadership in later life in whom his mind and the impact of his instruction lived on in such a way as significantly to alter the tone of public life at the Bar, on the bench and in the affairs of state, for some decades to come.

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[13] *Report of the Royal Commission of Inquiry into the State of the Universities of Scotland*, London, 1831, Vol. i, p. 54.

William C. Lehmann.

THE CONSTITUTION AND PROOF OF VOLUNTARY OBLIGATIONS

Part III

THE SYNTHESIS?

PART I[1] of this article was concerned to show that the generally accepted classification of obligations into those which (a) require writ in constitution, (b) require writ in proof, and (c) may be proved *prout de jure*, is misleading, and advanced the proposition that many of the problems which that classification raises might be solved if the hypothesis were adopted that: (1) save in the matter of the consensual contracts, Scots law is a " formal " system requiring something more to make a promise actionable than the mere declaration of consent; (2) the " something more " is generally the probative writ of the promisor delivered to the promisee; and (3) in principle no distinction in its present form existed between obligations now classified as *obligationes literis* on the one hand and as only requiring writ *in modum probationis* on the other. It was conceded that this hypothesis was invalid if the decisions in *Bryan* v. *Butters* and *Paterson* v. *Paterson* were good law in the sense that they were consistent with the previous authorities. In Part II these decisions were examined and shown to be unsatisfactory. The purpose of this Part is to endeavour to construct a coherent image of the earlier law.

The phenomenon common to all systems of voluntary obligations is the promise. Much of the affairs of men is transacted on the footing that, if A gives his promise to B, the latter in respect of the undertaking therein contained and in reliance on it can shape his future conduct. English law performs this task by defining an actionable promise as one supported by consideration, the bargain theory of contract. It has long been said that Scots law has never had this doctrine of consideration and it has been accepted as the necessary corollary that, therefore, " the law of Scotland infers an obligation from consent to undertake it, whether that obligation has or has not a consideration behind it."[2] This bland statement overlooks the fact that " there are probably few cases (or perhaps none) where an English court would hold that there was no consideration, and a Scottish court would permit proof by witnesses, but there are probably many in which the English courts would hold that there was consideration and yet the Scottish courts would insist on proof *scripto vel juramento*."[3] Bluntly put, this means that, whatever the theory, the scope for parole proof of a promise is much greater in English law. Gloag's euphemism, " The principle that an obligation for which no return is asked or made is nevertheless binding is limited, in its practical effects, by the rule that a gratuitous obligation cannot be proved except by the writ or oath of the promisor,"[4] conceals the much more brutal reality that by and large an onerous obligation to pay money (unless perhaps arising under a consensual contract) if exceeding £8 6s. 8d. must be proved by writ or oath and, conversely, the payment of the money (even if arising out of a consensual contract) must be so proved.[5] So viewed it becomes doubtful, not only whether the claim that Scots law infers an obligation from mere consent is, even if true, such a desirable principle, but also whether the claim is true.

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[1] *Ante*, p. 1.

The authority for the claim, and the proposition from which it is deduced, is Stair's formula " that every paction produceth action."[6] Whether the deduction is correct or whether it is largely a product of the reverential awe with which Scots lawyers speak of Stair's "architectural genius,"[7] and the belief that he formulated "his own theory of contract"[8] remains to be seen: what can be said is that, if the deduction is correct, the phrase "*nudum pactum*" should not be found in Scots law. A system which maintains that in principle all promises are actionable can have no use for a phrase which signifies a promise deliberately made but which is not actionable because it lacks an extrinsic quality which the law deems necessary. Thus, because of the doctrine of consideration, English law describes a promise unsupported by consideration (usually described as a "gratuitous promise") as *nudum pactum.* The civil law used the phrase to describe an informal declaration of consensus which did not fit into or comply with the requirements of its categories of real contracts, verbal (stipulatory) contracts, literal contracts, and consensual contracts. What is surprising, therefore, is to find Gloag maintaining that "from a very early period in the law of Scotland the phrase seems to have been used with the meaning of a gratuitous obligation,"[9] that is, so Gloag thought, in the English sense. More recently it has been said that Stair used *nudum pactum* as meaning "an agreement which has not been met by some reciprocal obligation."[10] Is there an explanation?

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[2] Gloag, *Contract* (2nd ed.) at p. 48.

[3] *Per* Lord Normand, 55 L.Q.R. at p. 365.

[4] *Op. cit.* at p. 50.

[5] *Hope Bros.* v. *Morrison*, 1960 S.C. 1; 1960 S.L.T. 80.

[6] I.10.7.

If it be true that the civilian tradition in Scots law is that element of it "which is the most rational, equitable, universal and potentially creative,"[11] it is reasonable to assume that that tradition was much more likely to influence Stair and his contemporaries than the English common law. If that were so, an explanation is available. In the civil law the real contracts were divided into the nominate contracts of *mutuum*, *commodatum*, *depositum*, and *pignus* and the innominate contracts of *do ut des*, *do ut facias*, *facio ut des*,

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[7] *Introduction to Hope's Major Practicks*, Stair Society, Vol. 3, at p. XVI.

[8] *Introduction to Scottish Legal History*, Stair Society, Vol. 20, at p. 253.

[9] *Op. cit.*, at p. 49 note 1.

[10] *Introduction to Scottish Legal History* at p. 250.

[11] T. B. Smith, "Strange Gods," 1959 J.R. at p. 121.

facio ut facias. The two classes were radically different. The former were founded on the delivery of property to one who was bound to return it; that is the delivery was conditional. In the latter if there was any delivery it was without reservation: hence the obligation arose from the promise of counter-performance. The innominate real contracts were in essence contracts for mutual performance and counter-performance, a promise for a promise; they were and became recognised as truly consensual contracts.[12]

This is all Stair meant by his formula, as can be seen from the report of *Sharp* [13] which he cited in support. There, two brothers bound themselves to tailzie their lands each to the other and signed agreements to that effect. It was argued *inter alia* " this was a contract, which being *inter contractus innominatos* treated of in the law, and of that nature as *facio ut facias*, either of the parties hath place of repentance *antequam perficiebatur rei interventu.*" Although not necessary to the decision the Lords found " that such mutual contracts of tailzie were not *contractus innominati.*" A verbal bargain was proveable *prout de jure* [14] or, as Hume so neatly puts it: " Bilateral contracts are always *bona fide*, unilateral as bonds for borrowed money *stricti juris.*" [15]

As will be seen later this doctrine of a " promise for a promise " did not develop as it might have. What it does negative is the claim that Scots law recognises as actionable a promise *per se.* What then was the theory of the law? The answer is fairly clear: it took over the methodology of the civil law.

Hope classified obligations as *bonae fidei* or *stricti juris*, the distinction being that while the former could be proved *prout de jure*, the latter required writing. If the pattern of the civil law was followed this means that, as only in respect of the consensual contracts of sale, partnership, location and mandate was parole evidence fully admissible, all else required writing. That that was so can be seen from Stair. Although he declared that Scots law did not have the remedy of stipulation, he had to concede that instead there were two remedies " *First*, if the matter be of great moment, or which requires to its perfection, solemnity in writ, all such agreements, promises and pactions *are accounted imperfect, and not obligatory until writ be subscribed.*[16] . . . The other remedy . . . is, that by a Statute of Parliament 1579, c. 80, all writs of great importance are to be subscribed by the party . . . before four witnesses, wherein custom hath interpreted matters of importance to be that which exceeds an hundred pounds Scots; and it is so far extended that, in matters where writ may, and uses to be adhibited, probation is not admitted by witnesses, but only by oath of party, or writ: and by these remedies, very necessarily introduced, the inconveniences foresaid are sufficiently caveated." [17] Taken literally, all this means is that instead of verbal formula,[18] Scots law relies on a writing containing the promise. This is not surprising and is indeed what happened in the civil law, where the stipulatio, originally verbal, became under Greek influence a written contract, liability springing from the writ.[19]

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[12] Sohm's *Institutes* (3rd ed.) at p. 381, note 6.

[13] (1631) Mor. 4299.

[14] Erskine, *Principles* (7th ed.) at p. 458; and see *Deuchar* v. *Brown* (1672) Mor. 12386.

[15] *Lectures*, Vol. II at p. 278.

The distinction which has so much bedevilled Scots law is found in a later passage where after discussing contracts perfected by writing, and which " have their force by writ, and therefore are called *chyrographa* " Stair added, " but all this is changed with us. . . . So that now the custom is, that writ is not the substance of the obligation, but is only a probation of the promise, though in some cases it be a necessary solemnity till which the parties may resile." [20] This is an interesting passage. First of all the distinction made clearly contradicts what he said in the earlier passage quoted above,[21] and also what he said when writing of obligations in general, "so naked pactions among the Romans were ineffectual, when they did not interpose stipulation. And with us, agreements requiring writ are ineffectual and may be resiled from, unless writ be interposed. Yea, in most matters of importance, obligations with us are ineffectual, unless proven by oath of party, or by writ." [22] Secondly he seems to have thought the *chirographum* a category distinct from the stipulatio which it was not. The *chirographum* was the Greek bond which, although later ousted by the Roman stipulatio, so influenced the latter that it ceased to be oral, the production of a written memorandum raising the presumption that the verbal bargain had in form been properly observed. The memorandum was, therefore, "proof" of the stipulatio. "The underlying principle therefore remained the same as before: it was not the memorandum (the literae), but the stipulatio (the verba) that constituted the essential foundation of the debtor's liability. But in the great majority of cases this principle was only saved by the help of a fiction. As a matter of fact the provisions of the *corpus juris* itself show that Roman law had already gone some way towards abandoning the law of verbal contracts in favour of the system traditionally employed by the Greeks from the oldest times in their legal transactions, the system namely of utilising written acknowledgments of a debt for the purpose of effecting binding agreements." [23] This explains Erskine's seemingly tautologous statement: "By the usage of Scotland, all written obligations, and particularly bonds for sums of money, are founded on prior contracts, and so have a cause antecedent to and distinct from the obligations themselves, and are therefore effectual from their dates." [24] Whether he understood the significance of his remark need not be inquired into; it is enough to say that it goes a long way towards destroying the proposition that Scots law infers an obligation from consent to undertake it. It is not a happy thought that perhaps the Whole Court in *Paterson*[25] fervently pursued an old and abandoned Roman fiction.

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[16] Writer's italics.

[17] I.10.9.

[18] Stair thought of the stipulatio as a verbal formula.

[19] Sohm *op. cit.* at p. 395.

[20] I.10.11.

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[21] *i.e.*, I.10.9.

[22] I.3.5., although this passage can be described as ambiguous and read the other way: perhaps Stair did so deliberately, the practice of exegesis being part of the Scottish tradition!

[23] Sohm *op. cit. loc. cit.*

[24] III.2.5.

The tragedy of the Scots law of voluntary obligations is that the misconstruction of Stair's formula seemed to dispense with the need for any worth while attempt to expound a theory of contract adequate to modern needs. Erskine was an antiquarian. Bell, of whom it has been said that he is "our chief authority on the law of contract,"[26] was too busy collating material to have time to consider the principles, and the same can be said of Gloag. Hume, although fond of saying that Scots law had formed a profound aversion to parole evidence, made no worth while endeavour to find out why. The iron curtain of "consent" has effectively prevented any sustained exploration of the territory under the régime of "writ." Lord Monboddo did make the attempt. "There appears to be a little nicety to make the distinction what promises, by our law are proveable by witnesses and what not. A mere gratuitous promise to pay a sum of money by way of donation, is clearly not proveable by witnesses; but of promises for valuable considerations some are so proveable and some are not; for example, a promise to pay money for a horse or any other moveable is certainly proveable by witnesses; but on the other hand, a promise to pay a sum of money which a man had borrowed is certainly not proveable by witnesses. . . . Where then is the distinction? It is this, in my apprehension—that only the contracts which, among the Roman lawyers, are called consensual contracts, such as *emptio, venditio, locatio conductio*, etc., can be proved by witnesses: but the contract of *mutuum*, a stipulation or a fidejussion, or any other contract among the Romans which required more than naked consent, cannot with us be proved by witnesses: among which number are all the innominate contracts, *do ut des, facio ut facias* etc."[27] Thus, even in the field of the innominate contracts "writ" had prevented the development of Stair's "every paction produceth action."

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[25] (1897) 25 R. 144.

[26] Lord Cooper, *Selected Papers*, at p. 190.

If, then, it be established that the Scots system of voluntary obligations was as formal a system as the civil law, the pertinent inquiry now is—why did the Scots system of writ divide into the two classes of *obligationes literis* and *in modum probationis?* As so often happens in the law, it is the supposed magical qualities of a phrase which wreak most havoc. Scots lawyers have always had a fatal propensity for vesting verbal tools with the divinity of sacraments. Stair's formula is one: *locus poenitentiae* is another.

The trouble began with the Act, 1681, c. 5, and its clause —"and that all such writs to be subscribed hereafter wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending upon the writer or the designation of the writer and witnesses." Before writing was common the uniform practice was sealing. The Act, 1540, introduced the requirements of subscription, and the Acts of 1579 and 1593 developed this innovation. Even so the practice was—

(a) that the statutes applied to all obligations requiring writing;

(b) the statutory solemnities were dispensed with if—
  (i) the writing was holograph,
  (ii) the writing was admitted by the granter as his writ,
  (iii) the writing was *in re mercatoria;*

(c) a common test of the genuineness of a signature was *comparatio literarum;*

(d) if the witnesses did not sign, the practice was to allow them to be called or the defect otherwise to be made good.

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[27] *Tassie* v. *McLintock* (1764) 5 Brown's Supplement 899.

Hence, although writ was pervasive, the practice was flexible, and the court had a large measure of discretion in determining whether or no a writing was the writ of the promisor. The Act, 1681, by its phrase " shall be null " raised a question which was canvassed from *Gordon* v. *McPherson* in 1686 [28] to *Grieve* v. *McFarlane* [29] in 1790 [30] and the answer was " that where a writ is null, as wanting the solemnities required by the Act, 1681, as the nullity is by that Act declared not suppliable, it is not relevant to support the deed that the granter acknowledge his subscription." [31] In *Muir* v. *Wallace* [32] it was decided that the restriction applied only to deeds in respect of heritage, " the rule introduced for the safety of the lieges as to their land rights, which had been fixed and acquiesced in so long must be rigidly observed."

The next step was to rationalise this distinction. In *Maitland* v. *Neilson* [33] Lord Braxfield said: " The writing by which this bargain is constituted is informal. The subscription is not denied; but that is not enough in this case. It is enough where writing is only necessary *in modum probationis*, but not so where writing is necessary to the constitution of the obligation." This at the hands of Bell became: " The plea of *locus poenitentiae* is grounded not merely on the want of evidence of a bargain, but on the want of that perfect and full consent which stands contradistinguished from imperfect resolution or intention. The want of evidence may be supplied by a reference to oath; the want of the badge of full and perfect consent never can be so supplied." [34] In *Carlyle* (May 26, 1790) Lord President Campbell satisfied himself with these propositions:

(1) A writing which offends against the Act is null and not suppliable.

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[28] Mor. 17021.

[29] Mor. 8459.

[30] *Cf.* Hume, *Lectures*, Vol. VI at pp. 25–26.

[31] *Foggo* v. *Milliken* (1746) Mor. 16979.

[32] (1770) Mor. 8457.

[33] (1779) Mor. 8459: Hailes 840.

[34] *Commentaries* I at p. 345.

(2) Therefore where writ is required *in modum probationis* oath is only admitted to prove the bargain: it cannot perfect the writ because the writ is null.

(3) Heritable rights are otherwise; writing is essential to their constitution: " this is founded on no general principle of common law regarding consensual contracts, but upon the unalterable principles of our feudal constitution."

(4) Therefore " to say any writing, however imperfect, shall be received and if there be a defect it may be *aliunde* supplied . . . is a contradiction in terms."

(5) " A null disposition will remain null as a writing till the end of time, and either party may resile from it while matters are entire; but if both parties are agreed they will corroborate it. They will carry it into execution *rebus ipsis et factis;* by homologation etc." [35]

(6) " Cautionary is an accessory obligation; and the question there is different." [36] What started off as a statutory rule then became in the mouth of Lord Justice-Clerk Inglis a matter of principle and an improbative writing which is null and cannot prove an obligation can prove a verbal bargain " for there may be writing sufficient to prove, though not to constitute the agreement." [37] And Lord Kyllachy could assert that *rei interventus* was acknowledged by everyone to be " a doctrine which belongs to the law of the constitution of obligations " and use the argument to demonstrate that an improbative writ which is null could prove an obligation to pay a loan.[38]

What these notes of Lord President Campbell prove is that in the course of the eighteenth century what little theory of contract Scots law ever had disappeared, probably for reasons well described by Bell. It was a century in which "all the learning of the Feudal law came more immediately to be called into use, and the professional success, as well as the character of a lawyer, was estimated chiefly according to his skill in the law of heritable property. The jurisprudence of mercantile dealings, fitted for times of a different complexion, was almost entirely abandoned."[39] The notes are not, however, wholly valueless. It is clear from them that the so-called *obligationes literis* of Scots law have nothing to do with the literal contracts of the civil law, but have their origin in the specialties of the law of feudal conveyancing. To constitute a real right in heritage there must be writing. This accords with Stair who speaks of "dispositions of lands and heritable rights, tacks, rentals and assignations to writs etc."[40] Oath was no substitute for the *breve testatum* and the later charter and sasine. Stair makes this quite clear: "Neither can an oath be urged to supply the want of a writ, when it is not only a means of probation, but a solemnity requisite for completing a right as a charter, seisin, or intimation of an assignation."[41] It is otherwise with an executory agreement, so that if a promise is not in the form required the lack of form can be cured by oath or *rei interventu;* the former is only a more articulate expression of corroboration, the latter is the doing of deeds which impute consent or bar the promisor from denying consent on the ground that the form of the law is lacking. So in the earlier cases no distinction was made between an executory agreement affecting heritage and any other where writ was required,[42] and *rei interventus* barred *locus poenitentiae* from either,[43] although there was a suggestion that the restriction to proof *scripto vel juramento* also applied to the *rei interventus.*[44]

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[35] Just why parties to an agreement requiring writ *in modum probationis* cannot do likewise is an unexplained mystery.

[36] *Cf.* notes printed in report of *Church of England Fire and Life Ass.* v. *Hodges* (1857) 19 D. 414 where Lord Justice-Clerk Hope, persuaded by this reasoning, held that a cautionary obligation is an *obligatio literarum* but did not explain what connection such an obligation has " with the unalterable principles of our feudal constitution."

[37] *Walker* v. *Flint* (1863) 1 M. 417 at p. 421.

[38] *Paterson* (1897) 25 R. 144 at p. 177.

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[39] *Commentaries* I at p. IX.

[40] I.10.9. Bell was misled by Stair who in comparing the use of writ with the stipulatio did not make the distinction so clearly as he might: *cf. Commentaries* I at p. 345 note 4.

[41] IV.44.4; and see *Kincaid* v. *Stirling* (1750) Mor. 8403; *Thaine* v. *Cant* (1583) Mor. 8405: *Alexander* v. *Kinglassie* (1687) Mor. 8422.

[42] *Baillie* v. *Somervell* (1611) Mor. 8398: *Low* v. *Lyell* (1611) Mor. 8398: *Johnston* v. *Logan* (1621) Mor. 8399: *A.* v. *B.* (1629) Mor. 8400: *Skeen* (1637) Mor. 8401: *Home* v. *Scot* (1671) Mor. 8402: *Hope* v. *Cleghorn* (1727) Mor. 8409: *Campbell* v. *Moir* (1681) Mor. 8421.

[43] *A.* v. *B.* (1553) Mor. 8410: *Scot* (1587) Mor. 8410: *Earl of Kinghorn* v. *Hay* (1674) Mor. 8414: *Gordon* v. *Pitsligo* (1674) Mor. 8415 (but the reports are diverse):

The distinction between an executory agreement and a conveyance was taken by the minority in *Muir* v. *Wallace*[45] but the majority were of the opinion that " there was no distinction betwixt a conveyance and an obligation to convey; for as the last could be rendered effectual by law, it would, if the solemnities were dispensed with, completely evade the rule." Like most arguments *in terrorem*, this bred further confusion. In the civil law a *nudum pactum*, although not actionable, could give rise to a " *naturalis obligatio* " pleadable by way of exception. When the stipulatio developed from proof of a verbal formula to the presumption from the production of a memorandum that the formula had been carried out, the absence of the memorandum did not mean that there had been a stipulatio which could not be proved: it meant that there had been no stipulatio and therefore it did not mean that there could not be a pact which might give rise to a *naturalis obligatio*. In other words the use of the memorandum did not deceive the Romans into converting the verbal stipulatio into a consensual contract, but this is the error into which Scots lawyers have fallen; " a party cannot turn what is, in its nature, a mere promise into a contract, so as to be allowed to prove it by parole, by simply averring that on the faith of the promise certain things were done by him; that is to say, he cannot turn a promise into a contract by *rei interventus*, so to speak."[46] In the light of the doctrine that Scots law infers an obligation from mere consent to undertake it, this statement is meaningless. According to the doctrine all contracts in Scots law are consensual, that is, are perfect when made. The promise the deceased made in *Smith* v. *Oliver* was not a mere promise but a contract which the

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Lawrie v. *Craick* (1697) Mor. 8425: *Thomson* (1699) Mor. 8426: *Graham* v. *Corbet* (1708) Mor. 8428: *Moodie* (1745) Mor. 8439: *Brown* v. *Whittingham* (1629) Mor. 8468.

[44] *Lawrie* v. *Craick* (1697) Mor. 8425: *Christie* (1745) Mor. 8437.

[45] (1770) Mor. 8457.

[46] *Smith* v. *Oliver*, 1911 S.C. 103 at p. 111; 1910, 2 S.L.T. 304.

promisee could not prove. There can be technically no *locus poenitentiae* in an executory agreement of sale once made: but the agreement may have to be proved inferentially *ex rebus et factis*. The artificial distinctions between perfecting a bargain and proving a bargain so well exemplified in *Walker* v. *Flint*[47] have also produced a distinction in the role of *rei interventus*: one moment it is a matter of constitution, the next moment a matter of evidence.[48] Both conceal the proper role of *rei interventus* as a species of personal bar, which is, if the promisee acted on the faith of the informal promise to his prejudice, was he entitled so to rely?—if so, ought the promisor to be barred from taking the objection that the promise was not in proper form? The distinctions just mentioned have prevented Scots law from facing these questions and have caused it to evade the problem by subterfuges which, though perhaps admirable solutions *ad hoc*, are no substitutes for sound policy.[49]

It is now possible to attempt a brief history, and restatement of the principles, of the law of voluntary obligations.

Prior to Stair obligations were classified as *bonae fidei* or *stricti juris*, the former capable of proof *prout de jure*, the latter requiring to be contained in writing. As only in respect of the consensual contracts of sale, partnership, location and mandate, was parole proof fully admissible, all else was affected by the need for writing. The form of such writing was dictated by the requirements of the authenticating statutes, but the practice was flexible and the need for writ not too heavy a burden. By the late seventeenth century for once in a while Scots law was not too obsessed with feudal conveyancing; commercial speculation was the order of the day, " the laws of commerce necessarily rose into notice,"[50] and Stair paid some attention to them. He propounded his " every paction produceth action," an idea which, if developed, would have made the primary classification between unilateral obligations and bilateral reciprocal obligations. It did not develop because the stipulatory system had too strong a hold on the innominate contracts. As it was, the oracular manner of his pronouncements not only misled but effectively prevented any later attempt to work out a system of contract. Stair's error was his failure to tackle the problem of writ, particularly as affecting innominate contracts.

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[47] (1863) 1 Mor. 417.

[48] Gloag *op. cit.* at pp. 46–47.

[49] *Bell* (1841) 3 D. 1201: *Dobie* v. *Lauder's Trs.* (1873) 11 Mor. 749.

[50] Bell's *Commentaries* I at p. VIII.

By the time the eighteenth century was well under way, two Jacobite risings had chased commerce from the country, and the Bar was engrossed with " difficult questions of high interest relative to the connection of superior and vassal, the nature and efficacy of destinations in deeds of entail, and the force of real securities over land." [51] The Bench was in the middle of its one hundred years' dispute as to the construction of the nullity clause of the Act, 1681, c. 5. The construction ultimately preferred was rationalised to suit the interests of the feudalists.[52] *Rei interventus* became a means to perfect a promise, otherwise " it involves a hazardous confounding of the alleged *rei interventus* with the terms of the agreement which these actings are said to validate, whereas the former ought to stand, in point of constitution, clear and independent of the latter." [53] Lord Gillies' plea that " when a man comes under any promise or makes another believe that he does so, so as to induce that other to abstain from taking a course which would enable him to get what he has a right to, he makes himself liable for the loss which may be suffered in consequence," [54] fell on deaf ears. To allow it would have been to allow *rei interventus* to prove the promise by parole evidence: a calamitous consequence!

The coming of the nineteenth century saw the system, such as it was, in a state akin to disintegration. The pressures of mercantilistic expansion compelled some measures of coherence to be attempted. One device was to classify almost every obligation which required writing as an *obligatio literarum*, for example, cautionary obligations[55] and innominate contracts.[56] In the case of loan the strictness of the law was relaxed by holding that, if the lender produced an acknowledgment under the hand of the borrower of the receipt of money, the rebuttable presumption was that the money had been received on loan.[57] *Paterson*[58] was an understandable attempt to reduce incomprehensible law to some order by equating " *in modum probationis* " with the English Statute of Frauds. Much the same was attempted in the case of cautionary obligations by section 6 of the Mercantile Law Amendment Act, 1856. Only in the case of the innominate contracts has there been a belated glimmer of light. In 1920, the cautious step was taken of approving the rule that innominate contracts if not of an unusual, anomalous, or peculiar character may be proved parole.[59]

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[51] *Op. cit. loc. cit.*

[52] In much the same way as the jury system has been rationalised in our own day.

[53] *Edmonston* (1861) 23 D. 995, *per* Lord Benholme at p. 1002: and see *Clark* (1860) 23 D. 74 where it was proved that a contract of partnership had been acted upon but the pursuer failed because she could not produce the improbative agreement.

[54] *Chaplin* v. *Allan* (1842) 4 D. 616 at p. 619.

In essence, however, the system, if it can be dignified by that name, remains a congeries of categories. Of general principle there is none, least of all a law of contract. These categories are—

(1) The so-called misnamed *obligationes literis* having its origin in the specialties of the law of feudal conveyancing. This category properly applies where writ is required for completing a real right. By *Muir* v. *Wallace*[60] the category was extended to include executory agreements concerning heritable rights. It is said that contracts of service for more than a year fall into this category, probably for no better reason than the veneration of the feudal lawyer for status. No other type of contract properly belongs to this category.

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[55] *Church of England Life Ass.* v. *Hodges* (1857) 19 D. 414.
[56] *Edmonston, supra.*
[57] *Thomson* v. *Geekie* (1861) 23 D. 693.
[58] (1897) 25 R. 144.
[59] *Smith* v. *Reekie*, 1920 S.C. 188; 1920 1 S.L.T. 76.
[60] (1770) Mor. 8457.

(2) The consensual contracts of sale, partnership, location and mandate, the only contracts in respect of which parole proof was originally fully admissible.

(3) The real contracts of *mutuum*, *commodatum*, *depositum*, and *pignus*. Probably an executory agreement to lend, or deposit, or pledge a corporeal moveable may be proved parole, but " wherever the point is the constitution of the particular contract as loan or pledge, the delivery of the thing, the real act which is the badge of the contract is indispensable."[61] A man cannot be under an obligation to redeliver unless the article has already been delivered to him.

(4) The stipulatory obligations or category *in modum probationis*, which originally embraced all obligations not classified under categories (1), (2), and (3), but into which a small inroad has been made by category (5).

(5) The " promise for a promise " category, described by Stair as " every paction produceth action." These are consensual contracts in the same sense as category (2). Their scope is limited to innominate contracts not of an unusual, anomalous or peculiar character, including an executory agreement under category (3).

(6) A consensual contract (that is, one belonging to categories (2) and (5)) becomes a stipulatory contract under category (4), if it is *pars contractus* that the agreement be constituted in writing.

To these categories the following rules are relevant:

(a) Promises and bargains falling into categories (2) and (5) are proveable *prout de jure*. A promise to redeliver falling within category (3) requires delivery to raise the obligation.

(b) To categories (1) and (4) the authenticating statutes apply. Proof *scripto* means proof by " writ," which is not synonymous with " writing." Until *Bryan* v. *Butters* and *Paterson* v. *Paterson* loan (that is, an obligation to repay money borrowed) was no exception.[62]

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[61] Bell's *Commentaries* Vol. I 335.

[62] *Alexander* (1830) 8 S. 602: *Miller* (1835) 13 S. 838: *Annand* (1869) 7 M. 526.

(c) A holograph writ dispenses with the statutory solemnities, but does not prove its own date.[63]

(d) A writ *in re mercatoria* also dispenses with the statutory solemnities provided it be subscribed by the granter.[64] Probably the dispensation does not hold good where the writ is required to constitute a real right in heritage.

(e) An admission, either on the closed record or on oath of reference, dispenses with the need for writ under category (4).

(f) Homologation and *rei interventus* are relevant both to categories (1) and (4) but since about the middle of the eighteenth century improbative writ or oath is required in addition. Both are relevant to loan [65] save that where the obligation is to pay money, the mere fact of payment of money is seldom a relevant averment.

The writer is sensible that many of the arguments advanced and propositions submitted by him are seemingly in the teeth of formidable authority, but he derives some consolation from the fact that the Occupiers' Liability (Scotland) Act, 1960, has recently found its way on to the statute book. There is, of course, one material difference: if his submissions are even tolerably accurate the House of Lords cannot be made the *diabolus ex machina*.[66]

ADDENDUM

It has often been said that our system is eclectic. Why we should be proud of a habit of thought which is philosophically cowardly, and perhaps legally disastrous, is difficult to understand. He who mixes his drinks becomes at best an object of pity, at worst an object of derision. The same fate can befall a legal system. Either we must restate our law of voluntary obligations in the spirit of the civil law or abandon our Romanist tradition and adopt the English common law. What we cannot do is to mix the two.

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[63] *Purvis* v. *Dowie* (1869) 7 M. 764.

[64] *Ramsay* (1632) Mor. 16963: Thomson (1676) Mor. 16968: of course no signature is necessary for account books and business records.

[65] *McCalman* v. *McArthur* (1864) 2 M. 678: *Grant* v. *Baillie* (1830) 8 S. 606; 2 Sc. Jur. 283: *Hamilton* v. *Wright* (1836) 14 S. 323 affd. (1838) 3 S. & McL. 127.

[66] He would be ungrateful if he did not acknowledge his indebtedness to Professor T. B. Smith for valuable comment and criticism: this does not mean that Professor Smith shares the writer's views.

The problem common to both the early English lawyers and their civilian counterparts was how to construct a doctrine of obligation which made a formless executory agreement enforceable. Each group reached a different solution.

The English started off with the two actions of debt and covenant, and eventually worked their way through to what is now known as the bargain theory of contract. Its virtues are extreme flexibility and wide scope for parole proof. Its vices have been until very recently an inability so to adapt itself as to tackle with imagination the problem of promissory situations where there is no element of bargain.

The civilians, although they started off with the apparent advantage of the Roman consensual contracts, seemed reluctant " to get out of the Roman habit of asking the question of validity separately for each contractual figure." [67] Although the consensual contracts were informal in the truest sense (they could be concluded in writing, orally, or by conduct, and were binding by the fact of agreement), the bias of legal systems has been against the enforcement of a mere promise. " At various times it has been claimed that mere promises as such received legal force in Hebrew, Greek, early German, and canon law. None of these claims can be justified." [68] Hence the civilians tended to identify " consensual " with a reciprocal engagement such as sale. This led in some countries, notably France, to the emergence of the doctrine of cause, and the civilians came near to a theory of bargain. That they did not go so far is perhaps because of the influence of the natural law philosophers, and jurists such as Domat (1625–96). The maxim *pacta sunt servanda* eventually triumphed, not as meaning all formless promises must be kept, but as meaning all formless executory agreements shall be kept, including executory innominate contracts.[69] Contract became synonymous with agreement, and the subjective interpretation of consent expounded by Savigny and others produced the technique of " offer and acceptance " which so beguiled the English judges of the nineteenth century, and has bewildered their successors.

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[67] Lawson: *A Common Lawyer looks at the Civil Law* at p. 148.
[68] Cohen: " The Basis of Contract," 46 Harv.L.R., at p. 574.

Soon Scots law (which means its lawyers, or at least some of them) must decide whether it is to have a general test of validity. If those who decide accept that " *conventio* without more = *contractus*," not only must we get rid of our categories, but also face the problem of the unilateral promise or *pollicitatio*. The principle of *Smith* v. *Oliver*[70] is not one of which to be proud. To be satisfied with it means that we shirk the issue of thinking out the *rationale* of voluntary obligation. On the other hand, it would be less trouble to let the Court of Appeal and the House of Lords do our thinking for us.

J. J. Gow

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[69] A development which, in spite of Stair, or because of him, did not spread to Scotland, and has encountered some difficulties in Italy and France. *Cf.* Lawson *op. cit.* at p. 134. The misfortune of Scots law has been that Stair saw too far too soon. In consequence he has suffered the fate of most visionaries, his fame has become legendary whilst his doctrine has been misunderstood and misrepresented.

[70] 1911 S.C. 103; 1910, 2 S.L.T. 304.

INTERFERENCE WITH THE COURT OF SESSION BY THE PRIVY COUNCIL

THE idea that the privy council interfered in any sinister sense with the work of the court of session [1] is not borne out by the records. Indeed, all the indications are to the contrary; and the contemporary authorities are silent or are in agreement [2] with this view. Of these authorities Balfour, Hope, Stair and Mackenzie were all privy councillors and lords of session—usually at the same time. The proposition of Mackenzie that the privy council "doth under the notion of Riots, and breaches of the public Peace hear to [*sic*] many causes Civil and Criminal" [3] is merely statement of an inevitable process, but not one which indicates encroachment on the jurisdiction of the court of session. Indeed, Mackenzie says elsewhere that "if any of these dip upon matter of law (for they are only judges *in facto*) they remit the Cognition of it to the Session and stop till they hear their Report." [4]

The editor of Hope's *Major Practicks* has grouped five paragraphs of the title on the privy council [5] under the rubric "Interference with Court of Session and municipal administration." Examination of the paragraphs drives one to the conclusion that they do not support the rubric:

8. Here the council (following on a complaint of a party who objected to the session allowing proof of letters of horning by witnesses) remitted the case not to themselves but to parliament [6] and parliament thereafter passed an Act limiting such proof to writ

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[1] McMillan, *Evolution of the Scottish Judiciary*, 53–54; *Introduction to Scottish Legal History*, 28.

[2] Balfour, *Practicks*, 267.

[3] Mackenzie, *Matters Criminal*, ii. 6. 1.

[4] Mackenzie, *Institutes*.

[5] *Major Practicks* (Stair Society), v. 2.

[6] According to Balfour the courts could not "make law" but must remit novel situations to parliament: *Practicks*, 1.

only[7]: this statute was possibly declaratory of the pre-existing law.[8]

18. This paragraph is clearly subordinate legislation, an act of council regulating, on an interim basis, the rights to the church lands. This had been necessary to prevent chaos after the reformation which took place the year before. The act was to subsist until parliament set up a permanent arrangement. The appropriate forum for questions relating to feus of church land was not the council but the lords compositors.[9]
19. This is merely a declaration of nullity of a decree of an inferior court which had purported to act in a matter which was *res judicata* of the court of session.
20. This is an ordinance of council regulating the meeting time of a court and was made under common law and statute.[10]
28. This is a citation by the council with the effect of transferring all disputes between the parties under the pacification of Perth to the chief judicatory, parliament.

Part of the difficulty in assessing the relationship between the privy council and the court of session arises from the change in the meaning of " civil action." At present, the term virtually means everything that is not criminal. Before the Union the proper forum for civil actions was the court of session. Then the term " civil action " was limited to actions concerning debts, lands, goods and gear; but it also excluded all the actions which were dealt with by specialised courts such as parliament (peerage), privy council (riots and king's causes, *i.e.*, matters of public law), exchequer (royal revenue), commissaries (*inter alia*, consistorial matters), admiral (maritime causes), Lyon (precedence), justiciar (crimes), chamberlain (burghs) and the like. Further, the privy council not only had its privative jurisdiction in riot and public law but had the unique function of a tribunal of conflicts by virtue of which it classified cases and remitted them to the appropriate jurisdiction.

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[7] 1578, c. 31 (*APS*, iii. 111); 1579, c. 45 (*APS*, iii. 162).

[8] *Cf. ADC*, i. 224.

[9] *RPC*, i. 192; *SHR*, xvi. (1919) 52–72; Donaldson, *Scottish Reformation*, *passim*.

[10] *Cf.* modern acts of sederunt regulating the sheriff courts. *Introduction*, 28, cites a similar ordinance as an illustration of thesis of interference.

The idea of conciliar interference in the session is foreign to the theoretical development of these institutions. In the course of the mid-sixteenth century an undifferentiated council became divided into two parts: a court of session and a privy council, each with distinct functions, civil actions and the king's business, respectively. Thereafter, statute and other pronouncements enjoined the lieges not to resort to the council and thereby impede the king's business.[11] The king's business, however, did include judicial disputes other than "civil actions": questions of public peace (actions of riot and oppression), of administrative law and of equity (in the sense of acts of grace).[12] It was the universal practice of the council whenever matters outwith their jurisdiction arose to remit them to the appropriate forum.

Of course the shreds of the prior development adhered to both bodies: the usual name for the college of justice was "the lords of council"; four of their number were expressly councillors; and in the early period "joint sessions" of privy council and session were convened for difficult cases.[13] Despite all that and despite the large common membership of the two bodies their respective functions did not overlap. There is nothing in the law or practice of the council to suggest, far less to support, the proposition that that body interrupted the due administration of justice of the court of session,[14] either by encroaching on its jurisdiction or by interfering in its deliberations.

PETER G. B. MCNEILL

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[11] *Acts of Lords of Council in Public Affairs*, 584; *APS*, iii. 44, 445 *et seq.*; 2 *RPC* iv. 470; v. 161.

[12] 3 *RPC*, vi. 280–281. The privy council is universally recognised as a supreme judicatory; but so was the court of session.

[13] *E.g.*, *RPC*, i. 162–238, *passim*.

[14] Other aspects of this problem have yet to be investigated: interference by the council in criminal justice, and interference by the king in civil and criminal justice.

CASES AND COMMENT

1. SCOTTISH CASES

HUSBAND AND WIFE—Nullity —Artificial insemination.

G. v. *G.*, 1961 S.L.T. 324, again raises a problem consequent on the increasing use of artificial insemination of the human female. Mrs. G. was impotent for psychological reasons, to the extent of being incapable of insemination by normal intercourse, but by artificial insemination by her husband's semen she gave birth to a child in 1949. G. and Mrs. G. subsequently formally adopted a second child. In 1958 the couple separated and G. subsequently petitioned for nullity on the ground of his wife's impotence. The Lord Ordinary held, undoubtedly correctly, that the marriage was voidable only, and hence that it could be approbated or homologated; on the facts he held that the artificial insemination, certainly when it resulted in the birth of a child, must be treated as approbation, rendering the marriage no longer voidable, but valid and binding. The subsequent adoption of the second child confirmed this. The petition accordingly fell to be dismissed. The facts here were stronger than in *W.* v. *W.* [1952] P. 152 and *Slater* v. *Slater* [1953] P. 235, in both of which adoption alone was held by the Court of Appeal to imply approbation of the marriage. The question left for consideration is the effect of artificial insemination by itself. Unsuccessful attempts at artificial insemination of an impotent wife would seem analogous to unsuccessful attempts at natural insemination, but it is well settled that it is impotency, incapacity for intercourse, not sterility, incapacity to conceive a child, which is the proper ground of nullity, and this would seem to suggest that, if physical or psychological incapacity for normal intercourse be proved to have existed *ab initio*, unsuccessful attempts at artificial insemination would not amount to approbation of the marriage. The Lord Ordinary said: " Even assuming that the insemination could be regarded as being an homologation intended to be conditional upon a child being born . . ."; could it even be regarded as being as much as conditional homologation, *esto* indeed that homologation can be conditional or imperfect? Probably attempted or unfruitful artificial insemination has no legal effect, but if conception results, the birth, or possibly even the pregnancy, operates homologation. This problem must, however, wait for the case which raises such facts. Of the rightness of the decision in the present case, there can be little doubt; but the dicta quoted should not be taken as warrant for a doctrine of conditional homologation, nor even for the view that unsuccessful attempts at artificial insemination operate homologation. The true view is probably that the birth of the child introduces a new factor making it socially inexpedient to regard the marriage as still voidable.

D. M. W.

REPARATION—Assignability of claim.

Purdon's Curator Bonis v. *Boyd*, 1961 S.L.T. 340, raises several issues of interest. A young woman, P., was riding as pillion passenger on a motor-cycle when it was in collision with a motor-car driven by W. She sustained serious injuries, and a *curator bonis* was appointed; on her behalf he sued B, the driver of another motor-cycle which was involved in the same collision. It appears that the motor-cycles, both ridden by youths with only provisional licences but each with a pillion passenger, were racing and both collided with the car which emerged from a side-road. The curator assigned P.'s right of action to W., who was sisted as an additional pursuer, *i.e.*, the action proceeded at the instance of cedent and assignee against B. For this course there is adequate warrant, and the practice has advantages in some cases.

The defender, however, challenged the title to sue, maintaining that a right to reparation for personal injuries, both for solatium and for patrimonial loss, was not assignable. This necessarily challenged the correctness of the decision in *Traill & Sons* v. *Aktieselskabat Dalbeattie, Ltd.* (1904) 6 F. 798; 12 S.L.T. 129, where it was held that a claim by a widow and children had been validly assigned. The Lord Ordinary considered himself bound by this decision, as he very probably was, and therefore repelled the plea to title to sue. In any event this argument could not have affected the title to sue of the cedent. But this question will certainly be reopened in a higher forum, where it promises to provoke considerable argument. Till then comment must be withheld.

The second point taken by the defender was that the assignee had paid the cedent (the *curator bonis*) a sum in reparation, and that full reparation had thereby been made to the injured girl, so that the defender's obligation was extinguished, but the assignation was not produced in process and it could not be alleged in debate that the girl's right to reparation had been fully discharged by the assignee in consideration for the assignation. This objection was accordingly held irrelevant, since the defender could not point to a decree or any other agreement showing that any sums paid had been received in full of reparation. The case is complicated by involved and unsatisfactory pleadings which do not very clearly raise the legal issues between the parties, but it seems likely to go further, when it may become somewhat clearer in substance if not in form.

D. M. W.

HUSBAND AND WIFE—Cruelty.

Comment has previously been made (*supra*, pp. 56–57) about the narrow distinction between *Mackenzie* v. *Mackenzie*, 1960 S.C. 322; 1961 S.L.T. 22, and *Breen* v. *Breen*, 1961 S.L.T. 185. *Breen* has now been affirmed by the Second Division (1961 S.L.T. (Notes) 70), and that court has declined to follow *Mackenzie*. From the brief report so far available the *ratio* appears to be that, judged by the standard applied by Scots law for determining whether a person could be held responsible or, by reason of insanity, not responsible for his conduct (which standard is not that of the English M'Naghten Rules), the defender in *Breen* was not responsible for the conduct of which the pursuer complained and which she contended amounted to cruelty. He was accordingly not guilty of cruelty justifying divorce. *M'Lachlan* v. *M'Lachlan*, 1945 S.C. 382, 1945 S.L.T. 339, it has now been declared, was a special case on its own facts, contrary to principle, and requiring reconsideration, but as a separation case rather than one of divorce it is not a direct authority. *Mackenzie*, 1961 S.L.T. 22, which was not followed, is probably still justifiable on its own facts.

A related point arose in *Waite* v. *Waite*, 1961 S.L.T. 375, where the husband treated his wife with lack of consideration, drank to excess, lied to her, and engaged in dishonesty which led to his imprisonment; the wife's health suffered in consequence of the husband's conduct. The First Division, reversing the Lord Ordinary, held that the husband's conduct, while in no wise beyond reproach, was not sufficient to amount to cruelty, and that his criminal conduct was not directed at or against his wife; dishonesty and criminality towards other persons were not cruelty towards his wife. Divorce accordingly fell to be refused. While this case seems to follow from other recent Scottish cases on cruelty " aimed at " a wife, there is no doubt that in cases such as this, conduct not in any way aimed at or implicating the wife might well be a direct cause of damage to the wife's health, and it is hard to see in such a case why the wife should not have her remedy.

D. M. W.

DAMAGES—Mora—Proof or jury trial.

Lord Strachan's Committee Report on Civil Jury Trial recommended that jury trial should continue to be the standard mode of inquiring into the facts in personal injury cases. In *Hunter* v. *John Brown & Co.*, 1961 S.L.T. 302, the First Division, affirming Lord Milligan, held that where two years and nearly eight months had elapsed between the happening of the accident and the raising of the action, there had been sufficient prejudice to the defenders by the inevitable dimming of the recollection of the witnesses to justify the refusal of jury trial and the allowance of a proof. This seems clearly justifiable. If the pursuer had delayed five months longer his action would have been excluded altogether by the Law Reform (Limitation of Actions) Act, 1954, which shortened the prescriptive period for actions of damages for personal injuries with precisely this consideration in mind. The Lord President emphasised that long delay had in fact, on the averments, prejudiced the defenders and that this was enough by itself to justify the case being sent to proof. No additional special reason further than the inevitable dimming of recollection by delay need be found. But delay *per se*, it is clear, would not be enough, though delay almost inevitably involves some element of dimmed recollection.

D. M. W.

HUSBAND AND WIFE —Domicile.

Two recent Scottish decisions on domicile show a welcome veering away from the rigid emphasis on the domicile of origin expounded by the House of Lords in *Liverpool Royal Infirmary* v. *Ramsay*, 1930 S.C.(H.L.) 83, and *Winans* v. *Att.-Gen.* [1904] A.C. 287, and a reflection of the increasing mobility of modern life. *Rankin* v. *Rankin*, 1960 S.L.T. 308, however, is more to be welcomed for the decision itself than for the method by which it was reached. Rankin, born and educated in Scotland but now practising as a barrister in England, had a Scottish domicile of origin which, for purposes of establishing divorce jurisdiction, he argued that he had maintained. There was evidence both in support of and against this plea, which was opposed by his wife: on the one hand, execution of a will in Scots form, inquiries as to prospects at the Scots Bar, burial of a child in a family lair in Edinburgh; on the other hand, purchase of a house in England, a substantial practice and financial commitments there; and conflicting statements of intention, besides. One would have thought that on this equivocal evidence the presumption in favour of the retention of a domicile of origin would have prevailed. Lord Guest, however, boldly looked to the future and found that " the prospect of such a return (*scil.* to Scotland) was remote " and an English domicile of choice had been acquired. It is not easy to compare domicile cases, where the facts are inevitably so varied; but this seems to be a step forward from *M'Lelland* v. *M'Lelland*, 1942 S.C. 502; 1943 S.L.T. 66, where there was as long a period of foreign residence as in *Rankin* and the intention was similarly obscure or at least indeterminate and yet the Scots domicile of origin was held to persist, following *Ramsay.*

Winans and George Bowie (*Ramsay*) were dead when the House of Lords pried into their earthly pilgrimage and so were unable to speak for themselves. In *Rankin*, however, the question of the party's statement of intention to the contrary had to be faced if the domicile of origin were to be ousted. Here Lord Guest's judgment is less convincing. He recounts with seeming approval the condemnation of such evidence by Jessel M.R. as " the lowest species of evidence " (*Doucet* v. *Geoghegan* (1878) 9 Ch.D. 441 at 456); it is a phrase of even older genesis and is characterised by Dicey as " probably an exaggeration " (7th ed.,

p. 102). It seems, moreover, inconsistent with the more moderate statement by Lord Buckmaster in *Ross* v. *Ross*, 1930 S.C.(H.L.) 1; 1929 S.L.T. 560 (which is also cited by Lord Guest) to the effect that " declarations of intention are rightly regarded " but must be examined in relation to the surrounding circumstances and fortified by conduct consistent with them. The statements by Rankin as to his intention to return to Scotland were made to witnesses whom the judge " saw no reason to disbelieve "; but he did disbelieve the wife's assertion that she had never heard any such suggestion. There was moreover certain conduct in confirmation of them (v. *supra*). Lord Guest, however, seems to have rejected the declarations by subjecting them to an additional test—whether, regarded objectively, such intentions were likely to be fulfilled. A more reasonable test, it is thought, was suggested by Lord Robertson in *Woodbury* v. *Sutherland's Trs.*, 1939 S.L.T. 93 (not cited in *Rankin*) where, after a consideration of English and Scots cases, he concluded " I think the upshot is that such declarations of intention . . . are by no means to be disregarded out of hand. On the contrary, if they consist with a conclusion which might reasonably be reached from a consideration of the other relevant facts, then, where the matter is *in dubio* upon the other relevant facts, they may turn the scale in favour of the domicile that is declared." Granted then the presumption in favour of the domicile of origin, it may be suggested that these declarations of intention should not have been rejected out of hand, if the judge was satisfied that it was an intention genuinely held, even if, in his view, of uncertain fulfilment. Generally, however, the decision is to be welcomed as reflecting the relative ease with which a man may nowadays settle under another legal system and the unreality of claiming to entertain any fixed long-term intentions in our disordered world.

In *Elmquist* v. *Elmquist*, 1961 S.L.T. (Notes) 71, a domicile of origin was again allowed to be relinquished in a case in which a Dane came with his wife and children to Scotland in 1957 to be trained as a teacher at a school for mentally-handicapped children. The wife returned to Denmark in 1958, but he decided in 1959 to stay permanently in Scotland and devote his life to working at the school. On his suing her for divorce on the ground of cruelty she pleaded no jurisdiction, but Lord Johnston held that he had acquired a domicile of choice in Scotland. The decision is fully in accordance with precedent and is remarkable only for the readiness with which the judge accepted a sudden change of intention from one that admittedly anticipated only a temporary residence to one envisaging permanent settlement and a severance of all previous ties. The period of residence after the new intention was formulated was short, but not unduly so, if the intention was accepted as being a firm and genuine one.

I. D. W.

2. ENGLISH CASES

NULLUM CRIMEN SINE LEGE—Conspiracy to corrupt public morals.

The decision in the "Ladies' Directory" case, *Shaw* v. *D. P. P.* [1961] 2 W.L.R. 897, whereby the publisher of a directory containing the names and addresses of prostitutes was convicted, is only of interest to Scots lawyers in one aspect—but a most important one. He was convicted of certain statutory crimes but also at common law of a conspiracy to corrupt public morals. The House of Lords in upholding his conviction on the latter charge, did so ostensibly on the basis that the English courts were *custos morum* of the people with an inherent right to create new crimes. This appears to run counter to what was said by Lord Goddard C.J. in *R.* v. *Newland* [1954] 1 Q.B. 158 at p. 167. With the greatest respect one must hope that the High Court of Justiciary, when called upon to adjudicate upon this important question, would prefer the strong dissenting judgment of Lord Reid.

It seems clear that in Scotland the High Court of Justiciary has an inherent right to declare criminal new ways of committing established crimes—or, to put it another way, to hold an act to be criminal if within an established principle of criminal wrongdoing (see Elliott, 1956 J.R. 22). This coincides with the view expressed in the dissenting opinion of Lord Cockburn in *Greenhuff* (1838) 2 Swin. 128, where his lordship, with great foresight, outlined the proper province of the courts. It may be that the offence in *Shaw* could have been brought within an established principle of criminal wrongdoing, as was the crime in *H.M. Advocate* v. *Martin*, 1956 J.C. 1; 1956 S.L.T. 193. But in the recent Scottish case of *Mannion*, February 10, 1961 (unreported), a man was convicted of hindering the course of justice by making himself scarce so that he could not be cited as a witness. This appears to involve an entirely new crime.

The question still awaits an authoritative decision of the High Court on appeal. It is respectfully submitted that the views expressed by Lord Reid in *Shaw* now represent the law of Scotland. One would only add this rider. Whilst it is a basic constitutional principle in most civilised countries that only the legislature can make new criminal laws, Scotland does not have the benefit of a speedy or efficient process for enacting purely "lawyer's law."

W. A. E.

LIABILITY FOR CARELESS MIS-STATEMENTS.

The decision of Salmon J. in *Clayton* v. *Woodman & Son* (*Builders*), *Ltd.* [1961] 3 W.L.R. 987, is of such importance that one must expect it to be appealed. In this case the plaintiff was a bricklayer on a building site and sued *inter alia* a firm of architects in respect of a careless misstatement in the form of an instruction given to him by one of their qualified architects. The plaintiff's employers required to do the building work in question under the architects' instructions and their architect on the site negligently told the plaintiff to cut part of a gable without shoring or strutting, and against the express wishes of the plaintiff who thought the gable unsafe. He was, however, obliged to do the work and was subsequently injured when the gable collapsed.

It has long been the law of England, though not so clearly that of Scotland, that a careless as distinct from a fraudulent misstatement is not actionable in the absence of a contractual or fiduciary relationship between the parties; see *Derry* v. *Peek* (1889) 14 App.Cas. 337; *Le Liévre* v. *Gould* (1893) 1 Q.B. 491; and *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164.

In *Clayton*, however, it has now been held that careless instructions which the giver knows are bound to be acted upon are different from mere statements or representations which will probably be acted upon. This is possibly an invalid distinction upon which even Salmon J. did not place entire reliance, for he then went on to say that he considered the defendant architects would still be liable under the principle of *Donoghue* v. *Stevenson*, 1932 S.C.(H.L.) 31; 1932 S.L.T. 317; [1932] A.C. 562, for their employee's careless misstatement, as he was under a clear duty of care to the plaintiff. The decision in *Candler* v. *Crane, Christmas & Co.*, *supra*, only excepted from the rule in *Donoghue* cases where the damage caused was financial and not physical, whereas in the present case the party was suing in respect of his physical injuries.

One wonders, however, if even this distinction is really tenable in Scotland because the recent decision in *Smith* v. *Duncan Stewart & Co., Ltd.*, 1961 S.L.T. 67, has distinguished between a claim for *solatium* for bodily injuries and one for patrimonial loss resulting therefrom—such as loss of wages. The latter is clearly financial loss, but is this excluded by the *ratio* in *Candler*? The outcome of any appeal in *Clayton* will be watched with interest in Scotland and it may be that the decision in *Candler* is contrary to the Scottish principle of *culpa*.

W. A. E.

LIMITATION OF ACTIONS—Latent disease—When cause of action accrued.

The decision in *Cartledge and Others* v. *E. Jopling & Sons, Ltd.* [1961] 3 W.L.R. 838, dealing with limitation of actions under the English Limitation Act, 1939, may be of application, in appropriate circumstances, to a Scottish case where time bar is pleaded under the Law Reform (Limitation of Actions) Act, 1954.

In *Cartledge* it was held, as in *Watson* v. *Winget*, 1960 S.C. (H.L.) 92; 1960 S.L.T. 321, that the cause of action accrued when there had been a wrongdoing by the defendant from which loss or damage was suffered by the plaintiff. *Cartledge*, however, went further to add that this damage may be irrespective of the knowledge of the plaintiff where, as here, the plaintiff was suffering from the latent disease of pneumoconiosis, caused by the defendant's negligence.

The plaintiff's action in respect of his pneumoconiosis was, however, raised in 1956 more than six years after the cause of action so accrued and the damage to him ceased—due to improved ventilation and the provision of respirators in 1950. As the period of limitation under the 1939 Act was six years the plaintiff's action was therefore time-barred. In 1950 the cause of action had clearly accrued, the disease being then ascertainable.

The unjustness of the statutory provision is that a man may have his cause of action time-barred before he becomes aware of his latent disease.

The Scottish limitation provisions under section 6 (1) of the 1954 Act differ somewhat from the English—rather curiously for a British statute in which no distinction of legal principles can be involved—and state that where the neglect is a continuing one the action must be raised within three years of when the neglect ceased. The Scottish wording clearly supports the English decision in *Cartledge* but for slightly different reasons. In England it was because the damage was caused and the cause of action had accrued by 1950. Under the Scottish provisions of the 1954 Act it would be because the neglect ceased on the employer taking the proper safety precautions. It would seem, however, that these points of time must always coincide.

The decision of the House of Lords in *Watson* v. *Winget*, *supra*, though obviously a just one, in its interpretation of the initial part of section 6 (1) (*a*) is a little difficult to reconcile with what can only be the wording of the latter part of that subsection.

Altogether section 6 of the 1954 Act is an unfortunate piece of Scottish parliamentary draftsmanship and amending legislation is clearly required. It is not even clear whether the section covers actions of defamation—the true *actiones injuriarum*.

W. A. E.

FEMALE WORKER WITH SENSITIVE SKIN—No duty not to employ in her own interests.

In *Withers* v. *Perry Chain Co., Ltd.* [1961] 1 W.L.R. 1314, the court held that the defendant employers had no duty towards an adult employee to refuse to employ her because, due to special sensitivity on her part, she would be liable to contract dermatitis. It was pointed out that, if the common law were otherwise, it would be imposing a restriction on the freedom of the individual, and would be oppressive to the employee by limiting her ability to find work. Moreover, there was no duty at common law requiring an employer to dismiss an employee rather than to retain him in employment and allow him to earn wages, because there might be some risk.

W. A. E.

TOWN & COUNTRY PLANNING—Ultra vires grant of planning permission—Mandatory nature of planning regulations.

The decision of Salmon J. in *Edwick* v. *Sunbury-on-Thames U. D. C.* [1961] 3 W.L.R. 553, quashing a decision of the local planning authority to refuse the plaintiff planning permission, seems to run counter to part of the reasoning of Lord Guest in the "George Square" case—*Simpson* v. *Edinburgh Corporation and Another*, 1961 S.L.T. 17. In *Edwick* the local planning authority's decision was quashed because it had not been served on the plaintiff within two or three months of the application as required by Article 5 of the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950, Art. 5. It was held that the regulation was mandatory rather than directory because, first, the language of the article suggested such an intention and, secondly, it was consonant with the general scheme of the Act and the order that there should be stringent terms on which a local planning authority should deal with applications.

The decision in the "George Square" case may not be the last word on the legal effect of the Town and Country Planning (Scotland) Act, 1947, in regard to the granting of planning applications.

W. A. E.

INSANITY—A defence to an action of divorce for adultery.

The defence of insanity has not yet been raised in Scotland as a defence to an action of divorce based upon adultery. It is, however, a recognised defence in cruelty cases; see *Breen* v. *Breen*, 1961 S.L.T. 385, although the test of insanity is not the M'Naghten Rules but medical evidence as to whether the defender was insane. In *S.* v. *S.* [1961] 3 W.L.R. 742, the defence of insanity has recently been established for the first time in England to protect a co-defender who, at the time she had intercourse with the defender, did not know, due to disease of the mind, that what she was doing was wrong. She was accordingly dismissed from the suit.

The decision seems correct in principle for Scots law (apart from the test of insanity) and would, of course, also enable the defender himself, if he was insane at the time he committed adultery, to escape decree. It may be argued, when a Scottish case arises, that insanity as a defence to an action of divorce for cruelty is in a different category owing to the wording of the Divorce (Scotland) Act, 1938, which enjoins that the defender must have been "guilty" of cruelty. It is submitted, however, that the matrimonial offence of adultery at common law must also require that the offending spouse be *compos mentis* at the time of the offence—see *Walton on Husband and Wife*, 3rd edition, page 55.

W. A. E.

3. PRIVY COUNCIL CASES

WORKMEN'S COMPENSATION: Injury: "At any time" before disablement.

Sunshine Porcelain Properties Pty., Ltd. v. *Iris Doreen Nash* ([1961] 3 W.L.R. 727) was an appeal, by special leave, from a majority decision of the High Court of Australia allowing an appeal from an order of the Full Court of the Supreme Court of Victoria. The case arose out of an application by the respondent under the Workers' Compensation Act claiming compensation from the appellants in respect of the disease of silicosis. In February 1957 the Workers' Compensation Board awarded compensation of a certain sum a week, and at the appellants' request stated a case for the determination of the court. The facts set out therein as having been admitted or proved were:

Between 1931 and 1938 the appellants employed the respondent as an insulator cleaner. She was about fifteen years old when her employment began. She married in December 1937 and ceased to work for the appellants in May 1938 and since that time her husband had supported her. At no time since she ceased to work for the appellants had she worked for wages and, at the time of the hearing of the application, had no intention of again taking up any employment. While with the appellants she was exposed to dust containing silica, and as a result of that exposure she developed silicosis, although it was not known to her nor manifested by any signs or symptoms until within the last few years. The first symptom which she noticed was breathlessness from about 1950 onwards. In December 1955 a doctor certified that the respondent was disabled from earning full wages because of silicosis. The appellants admitted that the respondent had been physically totally disabled for work by reason of the disease for the last twenty-four months preceding the date of the hearing. Because of the disease the applicant had incurred expenses for medical treatment since 1953, and she was in hospital for about a month in 1956. No notice of injury nor claim for compensation was given or made before January 5, 1956, and the appellants had not paid any sums by way of compensation. The question of law submitted for the opinion of the full court was: Whether on its findings of fact the board was justified in law in making the award or any and what part of it?

During the period in which the appellants employed the respondent the Act in force was the Workers' Compensation Act, 1928, by section 18 of which compensation was payable only for certain scheduled industrial diseases which did not include silicosis. An amending Act of 1946 (to be read and construed as one with the Act of 1928) provided by section 8 that for section 18 of the principal Act the following section should be substituted: "12.—(1) Where (*a*) a medical practitioner certifies that a worker is suffering from a disease and is thereby disabled from earning full wages at the work at which he was employed; or (*b*) . . . the disease is due to the nature of any employment in which the worker was employed at any time prior to the date of disablement, then . . . the worker . . . shall be entitled to compensation under this Act as if the disease were a personal injury by accident arising out of or in the course of that employment and the disablement shall be treated as the happening of the accident." The Workers' Compensation Act, 1951 (a consolidating Act), provided by section 5 (1): "If in any employment personal injury by accident arising out of or in the course of the employment is caused to a worker his employer shall . . . be liable to pay compensation." Section 12 (1) of the 1951 Act reproduced from the Act of 1946 section 18 as quoted above. That section differed from section 18 of the Act of 1928 in two respects material to the present case. First, it was not restricted to scheduled diseases and admittedly it covered silicosis; secondly, whereas under the Act of 1928 the disease had to be due to the nature of the employment in which the worker was employed within the twelve months previous to the date of disablement, after 1946 it was sufficient if the disease was due to the nature of the employment at any time before the date of disablement. Also, under the Act of 1928, the injury by accident had to arise out of and in the course of the employment, whereas it was sufficient under the Act of 1946 and later Acts if it arose out of or in the course of the employment. An amending Act substituted the word " injury " for the phrase " injury by accident " throughout the principal Act, and by a consequential amendment the last part of the section quoted now read " the disablement shall be treated as the happening of the injury." Section 20 of the Act of 1951 provided that the date of disablement should be deemed to be such date as the medical practitioner certified as the date on which the disablement began. In the present case the certificate was given on December 20, 1955, and in it the medical practitioner stated: " I certify that the disablement commenced about 1950 according to the history given."

The Board stated that it was unnecessary to determine whether on the certificate of the medical practitioner the date of disablement was 1950 or 1955. The respondent contended that the section quoted clearly applied to her case. Her disablement—the happening of the " injury "—occurred after it came into operation; her disablement and the disease which caused it were admittedly due to the nature of her employment with the appellants; and the long interval which elapsed between the termination of her employment and the onset of the disease and disability was immaterial because the Act by using the words " at any time " expressly entitled a worker to relate his disablement to past employment no matter how long that interval might be. The appellants relied on the strong presumption that an Act was not intended to be retrospective, and contended that that section could and should be construed so as to avoid retrospectivity.

Discussing the relevant sections, the Board stated that the main difficulty was the proper correlation of sections 5 and 12. In the ordinary case under section 5 the injury must be sustained while the worker is still in the employment, but under section 12 the position was far from clear. The appellants argued that section 12 merely adapted section 5 to apply it to diseases; section 5 was the leading section and section 12 followed it in requiring that there again the injury must happen or be sustained during the employment while the claimant is still a worker. The question at once arose, what was the injury? Was it the contracting of the disease or its first manifestation, or the disablement resulting from the disease? The respondent answered that in the case of some diseases, including silicosis, it was often impossible to discover when the disease was contracted, that the date of the first manifestation of the disease might be very doubtful, and that the legislature had foreseen and avoided the difficulty by enacting expressly in section 12 that the disablement should be treated as the happening of the injury. The next step in the argument was that the legislature could not have intended that the right to compensation should depend on whether or not disablement occurred while the claimant was still in employment; under section 20 the date of disablement might be the date on which the medical certificate was given, and it would be absurd to suppose that a claimant could lose his compensation merely because he did not get a certificate while still in employment. Therefore it must be held that section 12 did not follow section 5 in requiring that the injury must happen or be sustained during the employment.

Before dealing with those arguments the Board discussed the authorities, and, continuing, stated that section 12 did not follow section 5 in requiring that the injury must occur during the employment. It could only be held to do so if, first, notwithstanding the express provision that "the disablement shall be treated as the happening of the injury," it could be held that contracting the disease was the injury; and, secondly, it could be assumed that the disease was always contracted while still in the employment. The Board were unable to assume that, where a long interval had elapsed, as in the present case, between the last inhalation of noxious material and the first manifestation of the disease, it was a medical fact that the disease was contracted before that inhalation ceased, and then lay dormant for many years. They had no reason to exclude the possibility that the noxious material remaining in the claimant's body might only have brought on the disease after a long time. If that be a possibility, then it was unreasonable to suppose that the legislature intended the success of a claim for compensation to depend on whether or not the claimant could prove by medical evidence that his disease was in fact contracted before he left the employment. The particular point in the present case was whether the Act of 1946 could apply to a person who was not in employment after the Act was passed. Section 12 did not require a person to be still in employment when he sustained injury arising out of his employment, and the respondent did sustain an injury arising out of her employment after the Act of 1946 had been passed.

Nor was it an answer to a claim to show that the real cause of the injury was inhaling noxious material before the Act was passed. In those circumstances the presumption against a statute being retrospective could have little weight, if indeed it could apply at all. The question became one of the construction of the Act of 1946. The words of the new section 18 enacted by the Act of 1946 applied exactly to the present case. The certificate and disablement were subsequent to its passing. The disease was "due to the nature of any employment in which the worker was employed at any time prior to the date of disablement." There was nothing in the context or in the circumstances to require that any restricted meaning should be given to the words of that section. The appeal would accordingly be dismissed.

Dictum of Cockburn C.J. in *R.* v. *Ipswich Union* ((1877) 2 Q.B.D. 269 at p. 270) considered; *Clement* v. *D. Davis & Sons, Ltd.* ([1927] A.C. 126); *Blatchford* v. *Staddon & Founds* ([1927] A.C. 461); and *Bellambi Coal Co., Ltd.* v. *Clark* ((1953) 53 S.R. (N.S.W.) 440), also considered. *Victoria Insurance Co., Ltd.* v. *Junction North Broken Hill Mine* ([1925] A.C. 354) could not be regarded as establishing a principle of general application. *Greenhill* v. "*Daily Record,*" *Glasgow, Ltd.* (1909, 1 S.L.T. 344) dissented from.

BILL OF LADING: Construction: Short delivery.

Attorney-General of Ceylon v. *Scindia Steam Navigation Co., Ltd.* ([1961] 3 W.L.R. 936) was an appeal from a judgment and decree of the Supreme Court of Ceylon which had set aside a judgment and decree of the District Court of Colombo and dismissed the present appellant's action. The issue which arose on the present appeal was whether the appellant (who sued on behalf of the Government of Ceylon) was entitled to recover damages from the respondent company on the basis that there was a short delivery of certain bags of rice which were alleged to have been shipped on the respondent's vessel, *SS. Jalaveera.* The Government of Ceylon imported rice from Burma, and in connection with the carriage of such rice the Food Commissioner entered into an agreement with a number of shipping lines. Clause 6 (1) provided: "The transport and carriage of each separate cargo of rice shall be governed by the terms and conditions of the bill of lading . . . which shall be deemed to be the contract of carriage . . . between the shipper and/or consignee . . . and the owners of the carrying vessels: provided, however, that the rate or rates of freight charged and entered in the bill of lading shall not be in excess of the rates laid down in clause 3." A number of bags were shipped in the *SS. Jalaveera* at Rangoon under three bills of lading, and the ship proceeded direct to Colombo, not touching at any intermediate port. The claim which the appellant presented in the action was that 100,652 bags had been taken on board and that there was a failure to deliver 235 of them.

The three bills of lading were in similar terms, and the opening words of the paramount clause were: "All the terms, provisions and conditions of the Indian Carriage of Goods by Sea Act, 1925, and the schedule thereto are to apply to the contract contained in this bill of lading." The bills recited that certain numbers of packages were shipped in apparent good order and condition, the number of bags in each bill of lading was stated, and the total weight of those bags. The net average weight a bag was 160 lbs. Each bill further provided: "*Number and Contents.* 1. Weight, contents and value when shipped unknown. . . ." By rule 3 of Article III of the schedule to the Indian Carriage of Goods by Sea Act, 1925: "After receiving the goods into his charge, the carrier or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things . . . (*b*) Either the number of packages or pieces, or the quantity or weight . . . (*c*) The apparent order and condition of the goods: Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking." By rule 4: "Such bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (*a*), (*b*) and (*c*)."

At Colombo the cargo was discharged into lighters. In the transhipment of rice it was a usual occurrence that by the time the cargo arrived in Colombo many of the bags were torn. The bags were stacked in the ship and the pressure of the top ones on the lower ones caused rice to leak out of the lower ones. The torn bags were repaired before being off-loaded. Other bags (empty ones) were sent on board, into which the sweepings were placed which resulted from the spillages. Those bags were specially marked to indicate that they were sweepings bags. The bags torn and repaired were individually weighed before being loaded into lighters, as also were the bags of sweepings. A tally was taken and certain " boat notes " prepared which, in the result, showed that 100,417 bags had been loaded from the lighters into warehouse—235 fewer than the bills of lading recorded as having been loaded into the ship at Rangoon. The 100,417 bags included 541 torn and repaired. In addition, 287 bags of sweepings were landed into warehouse. Further spillage took place before the bags left the Customs warehouse, partly because more bags became damaged and torn and partly because hooks, used in unloading from the ship, caused holes to be made in the bags through which rice leaked out. Of the 100,417 bags delivered from the warehouse the number (inclusive of the 541 torn and repaired) which were torn or stitched or had mouths burst was 4,367. The total number of bags of sweepings delivered from the warehouse was 1,804 (1,517 more than the 287 off-loaded from the ship). The total gross weight of the 4,367 and the 1,804 bags was 6,641 cwt. 2 qr. 6 lb. After the Director of Food Supplies, Ceylon, had asserted his claims against the shipowners, the agents for the shipowners stated that the entire cargo loaded at the port of shipment had been discharged and delivered at Colombo. They further said by a later letter: " We understand that a quantity of as much as cwts. 403-0-18lb. was delivered to you as excess sweepings after setting off against shortage in torn and mouth burst bags ex-wharf. It will be noted, therefore, that this excess quantity more than covers the weight of the bags alleged to have been short-delivered." The 403 cwt. 0 qr. 18 lb. were calculated as follows: If the 4,367 bags had had a " sound weight " of 160 lb. a bag the total would have been 6,238 cwt. 2 qr. 8 lb. The total weight of the 4,367 and the 1,804 bags as delivered ex-warehouse was 6,641 cwt. 2 qr. 26 lb. The difference was 403 cwt. 0 qr. 18 lb., and that quantity, it was said, more than accounted for the contents of the 235 bags which were said to have been missing.

The Board stated that the respondent said that the ship had voyaged from Rangoon to Colombo direct and the entire cargo was discharged at Colombo and that thereupon " in terms of the said bills of lading and in law the liability of the [respondent] absolutely ceased." The respondent submitted that there was no evidence that the shipper had made any demand of the nature referred to in rule 3 of the Schedule to the Act of 1925. In any event, however, the fact was that bills of lading were issued stating the number of bags shipped. Though those statements of the bags shipped did not constitute conclusive evidence as against the shipowner, they formed strong prima facie evidence that the stated numbers of bags were shipped unless some provision in the bills of lading precluded that result. There was a condition: "Weight, contents and value when shipped unknown," but there was no disclaimer as to the number of bags. The respondent would be entitled to displace the prima facie evidence by showing that the goods or some of them were never actually put on board. The respondent contended that 235 bags had been put on board at Rangoon and had then been in some manner removed. It was further urged that, as the ship had sailed directly from Rangoon to Colombo, and it was not suggested that any rice was retained in the ship's hold after discharge, the probabilities were that the number of bags shipped was not 100,652 but 100,417. The Board could not accept the view that those circumstances were of sufficient weight to displace the prima facie evidence of the shipment of 100,652 bags. The conditions in the bills of lading did not disentitle the appellant from relying on the admissions that bags to the numbers stated in the bills were taken on board.

But the bills of lading were not even prima facie evidence of the weight, or contents or value of such bags. The appellant must prove the contents and weight and his loss by proving the contents of the bags and their value. The Board stated that from the circumstances it was a reasonable and proper inference that the bags which were shipped contained rice, and also such an inference from evidence that a bag, if full, would contain approximately 160 lb.—as the respondent accepted.

The respondent strongly contended that the evidence established that all the contents of the 100,652 bags were in fact delivered to and received by the Director of Food Supplies. On that submission, it was said that the missing 235 bags must have become completely denuded of their contents, but that those contents were in fact delivered and received: and that the damages, if that submission were correct, would only amount to approximately £11, the value of 235 empty bags. The Board stated that any empty bags should have been delivered into the lighters, but no empty bags were delivered and no boat note recorded the receipt of any empty bag. The submission was presented on the basis of the figures concerning the deliveries from the Customs warehouse. The Board examined them and said that that attractively developed argument depended for its validity on the assumption that no rice escaped at all while in the warehouse from the 96,050 which constituted over and above the 4,367 bags, the remainder of the 100,417 bags. Their Lordships could not think that that assumption was a valid one, and, having given their reasons, stated that, apart from those considerations, the question of short delivery fell to be decided not by reference to the times of cartage from the warehouse but to the times of delivery from the ship. If, as the Board concluded, the appellant had sufficiently proved that 100,652 bags were shipped and weighed approximately 160 lb. each, the evidence showed that only 100,417 bags had been delivered. If, as might seem surprising, 235 bags had been completely denuded of their contents, it would be singular and contrary to practice if none of the empty bags were delivered. Of the 100,417 bags delivered ex-ship some 541 had lost some of their contents: those bags had been torn and repaired. The sweepings in the 287 bags were not in the aggregate sufficient to account for the deficiencies of the 541 bags. The contents of 235 bags were not accounted for. The theory that the contents of 100,652 bags were received from the warehouse seemed impossible to reconcile with the ascertained facts: (i) that 100,417 bags and no more were discharged from the ship; (2) that the 541 torn and repaired bags contained 500 cwt. 1 qr. 6 lb.; and (3) that the total sweepings in the 287 bags were only 263 cwt. 0 qr. 13 lb. The appeal would be allowed.

JURY: Whether coercion or exhortation: non-direction.

Shoukatallie v. *The Queen* ([1961] 3 W.L.R. 1021) was an appeal by special leave from a judgment and order of the Federal Supreme Court of the West Indies dismissing an appeal from a judgment of the Supreme Court of British Honduras whereby the appellant was convicted of the murder of one Rampat (also called Peeka, and so hereinafter referred to). In British Guiana on February 10, 1960, Peeka had gone in the early morning to visit his cows on the Mahaica River. He was paddling a corial—a dug-out canoe—and never returned alive.

Five days later his body was recovered from the river. A post-mortem examination was held, which indicated that someone had shot him with a shot-gun, and that his body, while he was still alive, had been tied to a log of wood by means of vine branches and had then been thrown into the river. Suspicion fastened on two brothers, Shoukatallie and Mahomed Ali. They were tried before a judge and jury and both accused were convicted of murder, but in the case of Mahomed Ali the jury added a very strong recommendation to mercy. Both were sentenced to death. The Federal Court, on appeal, dismissed the appeal of Shoukatallie, but allowed that of Mahomed Ali and set aside his conviction and sentence. The appeal of Shoukatallie to the Privy Council was based on the conduct of the judge at the trial. It was said that he had exerted undue pressure on the jury to come to an agreement, and that for that reason the verdict could not stand.

The case for the Crown was that Shoukatallie and Mahomed Ali were acting together in concert in a common design to kill Peeka. The evidence for the prosecution was to the effect that Peeka was paddling along in his corial when a shot came from another corial in which were the two accused men. Shoukatallie, who fired the shot, shouted out and then fired the gun again at Peeka who fell on his face in his corial. Mahomed Ali then paddled their corial close to Peeka's corial, which Shoukatallie pulled across the creek. A short time later both accused men were seen near two corials. Shoukatallie was chopping wood and Mahomed Ali was twisting vine branches. The accused men did not give evidence on oath. They both made statements from the dock denying that they were in the vicinity (the jury rejected the alibi of the accused men), and they denied that they knew anything at all about the crime. The defence attacked the credibility of the witnesses.

The Board asked whether, even if the evidence of the prosecution was accepted, it was altogether clear that the shooting was pre-arranged. Might it not, perhaps, be that Shoukatallie fired the shots on his own account, with Mahomed Ali merely a spectator? The judge himself had that possibility in mind. He put it clearly to the jury that if Mahomed Ali took no part in the crime, and his presence there was merely accidental, they should acquit him. But he pointed out a difficulty in taking that view. If the medical evidence was accepted, it was not the shots which killed Peeka, but the immersion in the water. So he told the jury: "You may very well feel that [Shoukatallie] shot Peeka in cold blood, with malice aforethought, and that while he was still alive [Mahomed Ali] then joined in concert with him in order to kill Peeka by drowning him, and that it was in those circumstances that Peeka came to his death. If you feel that they were acting in concert then they would be equally guilty of the offence of murder in the eye of the law." The Board stated that, clear and comprehensive as it was, the judge in his summing-up seemed to have missed one point which might have operated in favour of Mahomed Ali: up to the moment that Peeka fell shot, Mahomed Ali might have been merely a spectator. Peeka fell so badly wounded that he was to all appearances dead, so that Mahomed Ali *thought* he was dead. Then Mahomed Ali, to save his brother Shoukatallie from conviction, helped him to dispose of the body by throwing it into the water. In that event Mahomed Ali would not have been guilty of murder, for he had no intent to kill. He would only have been guilty of manslaughter. Another view which the jury might conceivably have taken was that, despite the medical evidence, Peeka was actually shot dead, so that he was not alive but dead before Mahomed Ali took any part in the matter. In that event Mahomed Ali would only have been guilty as an accessory after the fact.

After the jury had stated that they disagreed on their verdict, but required no further direction, the trial judge reminded them of their oath, stated that the evidence led by the Crown and by the accused persons was clear, and said: "I can see no difficulty at all why you should not arrive at a final conclusion in this matter." He then told them to return to the jury room, consider the matter again and make up their minds one way or the other. "If you feel one way and another member of the jury thinks another way, then you must examine the arguments of each other and accept reason. You must not be pig-headed. I am now going to . . . give you an opportunity of arriving at an honest verdict in this case. Please see that you do not besmirch the fair name of your country." The jury later returned to court and asked for further legal directions as to accomplices after the fact. The judge said: "I am not quite sure what that means. During the course of my summing-up I did not mention the word 'accomplices.' What I did mention was 'acting in concert in pursuance of a common design to commit the offence for which the accused persons stand charge.' Do the jury desire further directions on that aspect of the matter?" The foreman replied "Yes," and the judge then directed the jury about principles in the first and second degree but he did not deal with accessories after the fact. Presumably, the Board said, he thought that it did not arise, but their Lordships noticed that, in those further directions, the judge missed the one point which he had missed in his summing-up—namely, that Peeka might have been dead, or to all appearances dead, and that Mahomed Ali believed that he was dead, before he took any part in the matter. The jury having returned the verdicts set out above, the Federal Supreme Court, on appeal, set aside the conviction of Mahomed Ali, stating: "The jury may have thought the deceased [Peeka] was dead before the second appellant [Mahomed Ali] assisted in the disposal of his body or, even if he was not dead, that the second appellant might have believed that he was, so that when he assisted in tying the deceased to a log and putting him in the river he had not the intention to kill," in which case, "the second appellant was not guilty of murder." The Board stated that, if Peeka was already dead before Mahomed Ali gave any assistance he could only be guilty of accessory after the fact; whereas, if Peeka was still alive but Mahomed Ali believed that he was dead, he would only be guilty of manslaughter, not of murder. It was the failure of the judge to assist the jury on that point which (among other reasons) led the Federal Court to quash the conviction. That point (which clearly distinguished the two cases) was not available to Shoukatallie, who appealed to the Board on the ground that the judge exerted undue pressure on the jury when they returned the first time and said that they could not agree. The gist of the complaint was that the judge told the jury that they *must* give a verdict one way or the other. He never told them that they were at liberty to disagree: and they might have been left under the impression that they would not be discharged until they did agree.

The Board stated that a judge might exhort a jury—and, indeed, it might be very proper that he should do so—so long as he did not use phrases which imported a measure of coercion such as was held to have been exerted in *R.* v. *Mills* ([1939] 2 K.B. 90). What the judge said in the present case was, perhaps, as the Federal Court stated, too strongly worded and might have been differently put. But that court did not see in it such a measure of coercion as to invalidate the verdict, nor did the Board. The more especially as the conduct of the jury showed that they were not in the least coerced by it. The Federal Court were right in view of the non-direction in allowing the appeal of Mahomed Ali; and at the same time they were right to dismiss the appeal of Shoukatallie. Before the Federal Supreme Court the appellants sought to adduce affidavits from two of the jurors about what took place in the jury room. That court rightly refused to admit the affidavits, and the point was not pressed before the Board. The appeal would be dismissed.

4. REPORTS

Report of the Scottish Advisory Council on the Treatment of Offenders, on the Extension of Compulsory After-Care to Additional Categories of Inmates and Prisoners

This century has seen a departure from the policy of attempting to prevent crime solely by the infliction of harsh sentences. Although punishment continues to operate as a general deterrent, in that it is intended to prevent potential offenders from committing crimes through fear of the consequences which might follow detection, it now has a strong reformative element. The declared aim of imprisonment is "to establish in convicted prisoners the will to lead a good and useful life on discharge and to fit them to do so" (rule 5 of the Prison (Scotland) Rules, 1952), and if this aim is carried to its logical conclusion the rehabilitative purpose of punishment cannot end abruptly when prisoners are put outside the prison gates. For many it is only then that their real punishment begins.

It is accordingly encouraging that the Secretary of State should have asked the Scottish Advisory Council on the Treatment of Offenders "to examine the law relating to the care of offenders after their discharge from prisons, borstal institutions and detention centres, and to consider whether it should be amended, particularly in order to extend compulsory after-care to additional categories."

The report on this remit, prepared by a committee of the Council and endorsed by the Council, is an interim one because the Secretary of State indicated that the Council's conclusions might be of help to him in the preparation of new criminal justice legislation for Scotland.

The report reveals the inadequate and vague after-care provisions contained in the Prisons (Scotland) Act, 1952. Briefly these require borstal inmates on release to be under supervision for one year from the date of release or, if it is earlier, until three years from the date of their sentence. Secondly, a prisoner under twenty-one at the start of his sentence may, having earned remission, be released on licence. This provision is rarely invoked in the case of young prisoners serving a sentence of less than six months, and the number under post-release supervision at the time the report was prepared was only forty-seven. The only other persons released from prison who are subject to compulsory after-care are:

(a) corrective trainees, who are eligible for release when they have served two-thirds of their sentence and are, if so released, invariably placed on licence. A condition of such licence usually being that they remain under the supervision of a specified society or person until the date when, had they not earned remission, their full sentence would have been completed;

(b) preventive detainees, who are similarly eligible for release on licence after serving two-thirds or five-sixths of their sentences; and

(c) persons serving sentences of life imprisonment who may be released on conditional licence by the Secretary of State.

These categories of released persons comprise a very small proportion of the offenders who on discharge from prison are in acute need of after-care treatment and sponsorship if they are to be absorbed into society as law-abiding citizens.

In considering the extension of after-care to other persons released from prisons, borstals, detention centres and other forms of custodial treatment the committee was first faced with the dilemma that after-care, if voluntarily accepted, is much more beneficial than that imposed compulsorily. This the committee discussed in relation to the known difficulty that those persons who most require after-care will rarely seek it voluntarily. Ideally all persons released from custody should be required to accept supervision and help on discharge but manifestly it is impossible at the present time immediately to apply compulsory after-care to all categories of prisoners. The committee therefore discussed the basis upon which the selection of prisoners for after-care treatment should be made.

The difficulties associated with selection by the court at the time of sentence, by the prison staff or a prison board during the serving of a sentence, and by the Secretary of State (who would have to rely on reports from the prisons), were considered, as was the suggestion that prisoners should be given the opportunity, while still in prison, of opting for release at an earlier date if they submitted to after-care.

The committee concluded that after-care must be imposed compulsorily by legislation and applied progressively—as staff and facilities become available—on a priority basis to those prisoners most likely to benefit from it.

One important aspect of after-care which the committee reported upon as unsatisfactory was the varying period for which discharged prisoners were placed under supervision. To make the period of after-care last only for the time that the prisoner had earned remission of sentence was patently absurd and meant that those prisoners who behaved badly in prison and, in consequence, forfeited much of their remission of sentence would only be subject to after-care for a relatively short period. In general it was just such discharged prisoners who were most in need of extended after-care. The committee therefore recommended that the after-care period for all released prisoners should be twelve months, those released from a detention centre, however, being subject to a period of conditional supervision for only six months.

In view of the interim nature of the report, it could not be expected that detailed reasons would be given in support of the recommendations regarding the persons selected for after-care, the period during which such after-care should be compulsorily applied, and its precise nature. Presumably these details can be expected in the second part of the report. In paragraph 3 the committee stated that consideration had been given to "the organisation and scope of after-care work in Scotland, including the methods of after-care which are followed and the human needs of persons returning to society after penal confinement," and that it was proposed to submit recommendations on these matters in a subsequent report. If we could not have looked forward to such a report the one under review would be subject to the criticism that the selection of persons for after-care and the length of time during which they should be subject to it had been decided on a purely arbitrary basis. It is surely necessary in reaching conclusions on such matters to decide precisely what is to be included in after-care. There must be a number of persons released from prison (stable members of society and not disturbed persons) who because they have homes or jobs, or both, to go to on discharge will be in need of little help from after-care officers. There are others, however, who on release from prison —and irrespective of the length of their sentence—will require intensive and possibly prolonged after-care. Accordingly, it seems impracticable to approach the question of the precise categories of prisoners who require after-care and the duration of such after-care purely on the basis of their age, the type of punishment imposed upon them or the duration of any period of imprisonment to which they may be sentenced. In paragraph 34 of the report the committee referred to this when it noted that " positive after-care is not just a matter of finding a man a job and leaving him to fend for himself thereafter. It must involve building up an understanding relationship between the after-care officer and the discharged person so that it may be possible for the latter to regain confidence or develop new confidence in the only context possible—a personal one. This cannot normally be accomplished in a matter of months." It would, therefore, have been more practicable if the recommendations of the committee had been in general terms, particularly with regard to the duration of after-care.

To be effective, after-care should probably be for an indeterminate period with provision for the Secretary of State to end the supervision when it was felt that the individual was sufficiently reintegrated into society to be able to stand on his own feet.

J. V. M. S.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, B.A., LL.B., Advocate, Sheriff-Substitute of The Lothians and Peebles

THE WAGON MOUND

The judgment of the Privy Council in *The Wagon Mound*[1] settles, or appears to settle, one of the most controversial questions of English law during the last forty years, namely whether, as the Court of Appeal held in *Re Polemis and Furness Withy & Co., Ltd.*,[2] liability for negligence extends to all damage which results directly from negligent conduct, or whether it is limited to those consequences which are within the particular risk, that is to say foreseeable by the negligent party. The Judicial Committee have now, in an Australian case, decided in favour of the latter view and disapproved of *Polemis*. While technically the decision is not binding on English courts, it must clearly be regarded as of very high authority. Whatever opinions one may have on the subject, the outcome is a notable victory for Dr. Goodhart, who has carried on a persistent and implacable war on *Polemis* from the beginning. There is a pardonably triumphant flavour in the editorial note in the *Law Quarterly Review*[3] which discusses whether the Court of Appeal and English courts of first instance are still bound by *Polemis*, and concludes that it is unnecessary to wait for the House of Lords to administer the *coup de grâce*.

In Scotland, according to the Board, *Polemis* "has been rejected with determination,"[4] a statement which can certainly be supported by a number of judicial dicta.[5] Professor Walker, however, points out that the applicability of *Polemis* in Scotland to a comparable case has never been clearly decided.[6] In nearly all the Scottish cases the question that has arisen has been that of culpability—that is to say, whether the defender was liable at all—and not of compensation—that is how far, or for how much of the loss, the defender was liable. Professor Walker has been able to find no instance of the word "foreseeable" being used in relation to remoteness of damage, and no reported case where, liability having been admitted or proved, some heads of the damages claimed were held to be irrecoverable as being beyond the loss that might have been anticipated by the negligent party. He founds in particular on the decision of the House of Lords in *Baron Vernon* v. *Metagama*[7] as showing that, in a true case of remoteness, the recovery of damages depends not on foreseeability but on whether they are "the natural and reasonable result of the negligent act,"[8] a phrase which Professor Walker seems justified in maintaining is here synonymous with "direct" result in the sense used in *Polemis*.

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[1] *Overseas Tankship (U.K.), Ltd.* v. *Morts Dock and Engineering Co., Ltd.* [1961] A.C. 388.

[2] [1921] 3 K.B. 560.

[3] "Obituary: *Re Polemis*" (1961) 77 L.Q.R. 175.

[4] At p. 420.

[5] See *Bourhill* v. *Young's Exr.*, 1941 S.C. 395; 1941 S.L.T. 364, *per* Lord Jamieson at 421, 381; 1942 S.C.(H.L.) 78; 1943 S.L.T. 105, *per* Lord Macmillan at 89, 109; *Malcolm* v. *Dickson*, 1951 S.C. 542; 1951 S.L.T. 357, *per* Lord Mackay at 551, 360; *Cowan* v. *National Coal Board*, 1958 S.L.T. (Notes) 19, *per* Lord Cameron.

[6] "Remoteness of Damage and *Re Polemis*," 1961 S.L.T.(News) 37.

The present writer is in sympathy with Professor Walker's arguments on this subject. But it must be admitted that *Polemis* is an unsatisfactory case in more than one respect. In the first place, the use of the term "direct" to describe consequences for which a negligent actor is liable is unhelpful, since it is no easier to define a "direct" than a "proximate" consequence, and the latter is perhaps less likely to mislead the unwary.[9] Secondly, it is open to doubt whether in *Polemis* the true issue was culpability or whether it was compensation. It was treated as a decision on damages by the House of Lords in *Bourhill* v. *Young's Exr.*[10] But Dr. Goodhart has vigorously maintained the contrary,[11] on the ground that the problem concerning unforeseen consequences is one of liability or responsibility, and must be answered before the question of compensation ever arises.

Re Polemis was an appeal from a decision of arbitrators who found that Arab workmen, employed by the charterers of a ship to shift tins of petrol from the hold to the 'tween decks of the ship in the port of Casablanca, had negligently allowed a heavy plank to fall into the hold, thus causing a spark which ignited petrol vapour in the hold with the consequent destruction of the ship by fire. The presence of petrol vapour in the hold was due to leakage from the tins. The arbitrators held that the workmen could have anticipated some damage to the ship by the fall of the plank, but could not have reasonably anticipated the spark which caused the fire. Since the outbreak of fire was instantaneous, the foreseeable damage was only potential. None might have occurred, in which case, but for the fire, there would have been no actionable negligence at all. The issue was whether the workmen were responsible for the fire. There accordingly appears to be force in the argument that *Polemis* was a decision on liability rather than on damages.

There is a further difficulty in the case. At the time of the accident tins of petrol were being hoisted from the hold of the ship by means of a rope and sling, and some of the workmen were in the hold. How could a reasonable man fail to realise that there was a considerable amount, as the arbitrators found, of petrol vapour in the hold, or that the fall of a heavy plank on to some metal substance might cause a spark, which could ignite the petrol vapour? The finding of the arbitrators has often for this reason been criticised.

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[7] 1928 S.C.(H.L.) 21; 1928 S.L.T. 117.

[8] *Per* Viscount Haldane at 25, 118.

[9] Thus the damage in *Scott* v. *Shepherd* (1773) 2 W.Bl. 892 was said to be the direct result of throwing the squib. But in another sense it might be described as quite the contrary.

[10] *Supra.*

[11] "The Imaginary Necktie and *Re Polemis*" (1952) 68 L.Q.R. 514, at 522.

Thus Professor Newark calls it "perverse."[12] We must assume, however, that the outbreak of fire was unforeseeable in the light of all the circumstances that could have been known to or appreciated by the workmen at the time the plank was allowed to fall into the hold.

The facts in *The Wagon Mound*[13] had some resemblance to those in *Polemis*, but were far more complicated. The defendants were charterers of a vessel, *The Wagon Mound*, lying at a wharf in Sydney Harbour some 200 yards from a timber wharf belonging to the plaintiffs, where another ship was being refitted by them and oxy-acetylene welding operations were being carried on. Owing to the carelessness of the defendants' servants, a large amount of bunkering, or furnace, oil was allowed to spill on the water, and it spread to the plaintiffs' wharf. When the plaintiffs' works manager became aware of this he instructed his workmen to stop the welding work and spoke to the manager of the Caltex wharf, where the *Wagon Mound* was berthed, who assured him that there was no danger. He accordingly instructed that work should be resumed, but that safety precautions should be taken to prevent inflammable material falling on to the oil. An inspector employed by the Maritime Services Board inspected the oil and came to the conclusion also that it was not a fire hazard. Two days later the oil burst into flames and damaged both the plaintiffs' wharf and the vessel under repair at it. Scientific experiments carried out after the fire showed that furnace oil floating on sea water cannot be directly ignited by molten metal, but that the oil could have been fired by pieces of molten metal falling on to cotton waste or rag soaked in oil floating on the water.

The trial judge found that the damage to the plaintiffs' wharf resulted from a fire originating in the way suggested by the scientist who carried out the experiments, and that the defendants did not know, and could not reasonably have known, that the oil was capable of being set on fire when spread on water. He also found that the oil had done some foreseeable damage to the plaintiffs' wharf by fouling the slipways. In these circumstances he held the defendants liable for the fire damage on the principles laid down in *Polemis*, and the Supreme Court of New South Wales unanimously dismissed the defendants' appeal.

There is what may be thought to be a crucial distinction between the facts of *Polemis* and those of *The Wagon Mound*. In the former case the stevedores, on the assumption that they were ignorant of the relevant circumstances, might be excused for not foreseeing the consequence of allowing a plank to fall into the hold, but the fire was in the knowledge of these circumstances hardly an unnatural or improbable event. In the latter case the fire could not have been anticipated by an expert, far less a reasonable man, as a likely consequence of the escape of the oil. Whatever meaning is given to the word "direct," it cannot be denied that the fire in *Polemis* was the direct consequence of the fall of the plank. Delivering the judgment of the Supreme Court in *The Wagon Mound* Manning J.[14]

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[12] (1960) 76 L.Q.R. 594.

[13] [1958] 1 Lloyd's 575; [1959] 2 Lloyd's Rep. 697.

[14] [1959] 2 Lloyd's Rep. at p. 709.

observed that the events which immediately preceded the fire comprised "what must have been a most extraordinary and unusual combination." He continued, "If a logical analysis is made of this series of events, there is very strong support for the view that there were intervening circumstances of a kind which render it impossible to say that the conflagration was a direct result of the oil spillage." Nevertheless he came to the conclusion that it actually was the direct result of the escape of the oil, on the ground that, while each occurrence in the chain of events that led to the fire was improbable, and "improbability was heaped upon improbability," the ordinary man in the street would unhesitatingly have stated this to be the cause of the fire.[14a]

The reasoning is, with all respect, as fallacious as it is self-contradictory; for, as Dr. Goodhart remarks, the ordinary man in the street, if he made this answer when asked to state the cause of the fire, would only do so because he believed that the oil was inflammable.[15] On being assured that furnace oil spread on water cannot normally be ignited by pieces of molten metal falling on it, the ordinary man would probably say that the spillage of the oil was one of the causes of the fire, but not the effective cause, and at any rate was not the direct cause.

Accordingly, there would seem to have been ample room for distinguishing *Polemis* in the recent case. The Australian courts, however, accepted the decision in *Polemis* as binding upon them, and the Privy Council, in allowing the appeal of the defendants, assumed without discussion that there was no material difference in the facts. The Board directed all their attention to demolishing the rule laid down in *Polemis*, which they went out of their way to say should "no longer be regarded as good law." Even if the decision in *Polemis* was wrong or the *Polemis* rule defective, it does not follow that the rule set up by the Privy Council in its place, the *Wagon Mound* rule—or perhaps it would be better called the Goodhart rule—ought to be adopted.

Two main arguments are generally advanced in favour of the new rule:

(a) It is argued, in the first place, that liability should not be divorced from fault. If negligence consists in failure to take proper care to avoid causing harm to others, it is inequitable and contrary to principle that liability should extend further than the consequences which can be foreseen by the person guilty of negligence, since he cannot be expected to guard against consequences he is unable to foresee. In regard to such consequences he is not negligent at all. The Arab workmen in *Polemis* may have been negligent, or rather potentially negligent, in respect of the damage which they might have anticipated, but in respect of the fire damage they were not negligent, and therefore their employers should not have been made liable for it.

This argument has a specious air of logic about it. But it is inept to speak of negligence in regard to consequences, as opposed to negligence in regard to risks. Negligence consists in failure to avoid acts or omissions, not their consequences. For in fact the consequences, even the immediate consequences, of many acts are unforeseeable and the ulterior consequences of any act whatsoever are beyond human powers of foresight. If a motorist drives over a blind cross-roads without proper care he may be held to be negligent towards another driver with whose vehicle he collides, because he is able, and bound, to foresee the risk that some other vehicle or object may come into his path before he can stop. But he cannot possibly foresee what the consequences of his carelessness may be. There may be a collision, or another vehicle may be obliged to swerve suddenly and may run into a wall, or a hundred other things may happen. Suppose that a person, emerging from a house at the cross-roads, steps into the roadway at the precise instant of a collision and is knocked down by one of the colliding cars: what sense does it make to say that the offending driver had a duty to foresee and avoid a consequence of his careless driving, namely the danger to the pedestrian, which only came into existence when it was too late for the driver to do anything about it? Or would it be maintained, as the reasoning of Dr. Goodhart and the Privy Council appears to imply, that the careless driver was not negligent towards the pedestrian, his carelessness having been exhausted at the moment when he no longer had an opportunity to avoid the collision by bringing his car to a stop? The contrary was, however, decided by the House of Lords in *Carmarthenshire County Council* v. *Lewis*,[16] an analogous case to that figured above. A four-year-old child attending a public nursery school strayed from the premises on to a public highway, with the result that a lorry driver in trying to avoid it struck a telegraph pole and was killed. The circumstances were held to disclose negligence on the part of the education authority in allowing the child to be temporarily unsupervised, and a gate on to the road to be open or easily opened. The fault for which they were liable consisted in failure to take adequate care to avoid harm, not to the child, who suffered none, but to the lorry-driver, although at the time when their breach of duty occurred the lorry-driver was almost certainly both unknown to the defendants and in a position where no danger to him could possibly be anticipated.

[14a] *Ibid.* at p. 711.

[15] "Liability and Compensation" (1960) 76 L.Q.R. 567. Mr. A. M. Honoré makes a similar criticism in a comment on the case in (1961) 39 Can.B.R. 267. He thinks that the damage was too remote.

(b) The other main argument in favour of the rule adopted in *The Wagon Mound* is on the ground of its greater simplicity than the *Polemis* rule. In future, writes Dr. Glanville Williams, discussing the question in the *Law Quarterly Review* for April 1961,[17] we shall be spared most of the insoluble problems of causation and the subtleties of *novus actus interveniens*, " and shall be left with a comparatively simple rule the application of which involves merely an adjudication of fact." But after looking hopefully forward to this prospect at the beginning of his article, Dr. Glanville Williams shows that unfortunately, when the matter is examined closely, the foreseeability test of remoteness is far from being so simple as it appears at first sight.

There is the problem, for example, of " the unforeseeable plaintiff," which arose in *Smith* v. *London and South Western Ry.*,[18] where a spark from a railway engine ignited heaps of dried grass- and hedge-trimmings beside a railway line. The fire spread to a stubble-field beyond the hedge, from which it was carried by a high wind across a road to the plaintiff's cottage, two hundred yards distant from the spot where the fire began. The railway company were held liable for the burning of the cottage. In such a case, as Dr. Glanville Williams concedes, it would seem anomalous that a wrongdoer should be liable to A (the owner of the stubble-field) but not to B (the owner of the cottage), on the ground that the extent to which the fire spread was unforeseeable. Thus he thinks that a doctrine of " transferred negligence " may be required in a strictly limited class of cases, to the effect that where D is negligent towards O in a particular respect, and his negligence injures P in just the same respect, D becomes liable to P, although he could not foresee injury to him.[19]

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[16] [1955] A.C. 549.

[17] " The Risk Principle " (1961) 77 L.Q.R. 179.

Dr. Glanville Williams also admits that foreseeability is not a test applicable to nervous shock cases, or at least that it is not the only limit to liability, and that there are other instances in which foreseeability can scarcely be the sole test, in particular where an element of legal policy enters in.[20] Again, he is obliged to admit that the risk, or foreseeability, principle does not apply to intended results, for they are in law never too remote.[21] Yet it is hard to see why, damages not being punitive, a negligent wrongdoer should be able to escape liability by showing that he could not foresee the possibility of the actual injury caused by him, or its nature, or the particular victim injured, whereas a deliberate wrongdoer cannot so excuse himself.

Dr. Glanville Williams is much perplexed by the bearing of *The Wagon Mound* decision on what is often called the " eggshell skull " rule. A strict application of the decision of the Privy Council is inconsistent with the well-established principle that a wrongdoer must take his victim as he finds him, once breach of duty towards him has been established, and cannot be heard to say that the victim was predisposed to some disease or specially sensitive to physical injury.[22] If the risk principle is not to be seriously undermined by the " eggshell skull " rule, this rule must be carefully confined to injury to the person. Otherwise why should a man with a weak heart recover damages, but not the owner of a ship with a hold full of petrol vapour?

The " eggshell skull " rule is regarded by Dr. Glanville Williams as a particular instance of the wider question, how far the foreseeability test can be applied to ulterior harms. Ordinary foresight, as he points out, does not go beyond a very general judgment; it does not enter into the ulterior consequences of the immediate risk. " Nevertheless, the test of foresight is frequently used in the courts as though it settled the precise extent of the defendant's liability for his negligence. It seems obvious that this test, though fairly workable in settling the initial question of negligence, becomes artificial when it is thus extended to cover the extent of liability for a chain of consequences." For this reason he concludes that, in respect of ulterior harms, Hart and Honoré [23] are right in saying that the test of foreseeability is a way of distinguishing between normal and abnormal consequences. The question is, not whether the harm can be foreseen, but whether it is within ordinary experience.

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[18] (1870) L.R. 6 C.P. 14.

[19] But this exception is not wide enough to include *Carmarthenshire C. C.* v. *Lewis*, *supra*, where the plaintiff was also unforeseeable.

[20] He cites *The Liesbosch* v. *The Edison* [1933] A.C. 449.

[21] Salmond, *Torts*, 12th ed., p. 715; Winfield, *Tort*, 6th ed., p. 86; Walker, *Damages*, p. 539.

[22] *Dulieu* v. *White* [1901] 2 K.B. 669, *per* Kennedy J. at 679; *McDonald* v. *Smellie* (1903) 5 F. 955; *Currie* v. *Wardrop*, 1927 S.C. 538, 555; 1927 S.L.T. 383, *per* Lord Murray at 392; *Bourhill* v. *Young's Exr.*, 1942 S.C.(H.L.) 78; 1943 S.L.T. 105, *per* Lord Wright at 92, 110; *Restatement of Torts* (1948 Supp.), 738.

It is strange that Dr. Glanville Williams does not perceive the effect of the qualifications he makes to " the comparatively simple rule " approved by the Privy Council in *The Wagon Mound*. Above all, rejection of the foreseeability test as a means of deciding whether a negligent person is liable for the ulterior consequences of his negligence would destroy the very basis of the decision of the Board. Having come to praise *The Wagon Mound*, Dr. Glanville Williams stays to torpedo it, and Dr. Goodhart may be inclined to feel that he has been stabbed in the back by an ally. For the whole problem raised by *Polemis* is one of remoteness of consequences. Nobody denies that the initial question of negligence, the question, that is, of culpability, is to be answered by considering what a reasonable man in the position of the actor would have anticipated at the time of the act complained of. The dispute is as to whether the test of the actor's reasonable foresight is to be applied to determine his liability for ulterior consequences of a negligent act, that is, in the wide sense implied by Dr. Glanville Williams, unexpected consequences which the actor could not be supposed to anticipate. The problem revolves largely round the distinction between the relevance of foresight to culpability and its relevance to compensation, which was asserted by Lord Sumner in *Weld-Blundell* v. *Stephens* [24] and denied by the Privy Council in *The Wagon Mound*.[25]

Confusion is apt to arise from the use of the words " culpability " and " compensation " in different meanings. " Compensation," it has been pointed out, may refer to the heads of damage for which a wrongdoer may be liable, or it may refer to the actual damages claimed against him in terms of money. Dr. Goodhart asserts that the first of these alternatives is a question concerning liability and only the second a question of compensation, and he criticises Lord Sumner's dictum in *Weld-Blundell* v. *Stephens* on that account.[26] But can this be correct? The measurement of damages in terms of money is logically subsequent to determination of the heads of damage or loss under which monetary compensation falls to be measured. And, equally, only when liability has been at least notionally established does the question emerge of determining the heads, or items, of damage for which compensation is sought. Thus where liability for negligent damage to a vessel was admitted, with the consequence that it had to go into dry dock for repairs, and while it was in dock delay occurred owing to a strike of workmen, the question was whether or not damages claimed in respect of the loss of use of the vessel by reason of the strike were too remote.[27] This was a clear case of determination of the heads of damage recoverable, liability not being in issue. The question, what amount of damages in terms of money could be recovered was, of course, a separate and subsequent one, dependent on the actual loss suffered, which could only arise if, as in fact was held, the damages claimed were not too remote.

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[23] *Causation in the Law*, 230 *et seq.*

[24] [1920] A.C. 956 at 984.

[25] *Supra*, at 425.

[26] " Liability and Compensation," *supra*, at 576.

It may be maintained that Dr. Goodhart's proposition, though perhaps an incorrect statement of the law as it was when he wrote, was a correct anticipation of the law as it is, or English law at least, following *The Wagon Mound* decision. On a literal interpretation of the opinion of the Board, the question of compensation is to be determined by considering what heads of damage could have been foreseen by the negligent party, and if none could have been foreseen there is no liability (and therefore, strictly, no negligence). "It is vain to isolate liability from its context and to say that B is or is not liable, and then to ask for what damage he is liable. For his liability is in respect of that damage and no other." [28] A logical consequence would appear to be that the measurement of damages as well as the ascertainment of heads of damage should depend on the foresight of the defender, and that courts should proceed to fix them, not on the basis of the pursuer's loss, but according to the degree of fault shown by the defender. Dr. Goodhart, however, would not go so far as this. In any event, the doctrine enunciated by the Privy Council, at least in those cases where the issue is ascertainment of heads of damage or measurement of damages, is revolutionary. "A great upheaval of recognised authority," Lord Wright has written, "would be necessary, indeed a breach of authority with tradition and precedents for which statutory enactments would be necessary." [29]

That this is not an exaggeration is surely apparent if we bear in mind the tract of authority, mainly in shipping cases, dealing with the recovery of damages after proof or admission of liability for negligence. *Baron Vernon* v. *Metagama*, referred to by Professor Walker in his article mentioned above, may serve as an illustration. As he remarks, being a Scottish appeal to the House of Lords, it is of conclusive authority in this matter so far as our law is concerned. In that case the defenders admitted liability for a collision between two vessels, and the loss caused thereby, and the issue was whether the pursuers were entitled to damages as for the total loss of their vessel or whether the damages claimed were excessive, on the ground that the sinking of the vessel after the collision was due to their negligence. The vessel was not seriously damaged by the collision and remained anchored in the Clyde in a position of safety, with all necessary salvage appliances available to her and with steam in her engines, for about thirty-six hours after the collision. According to a statement made by one of her owners, it seemed hardly conceivable that she should sink, as, owing to errors of seamanship on the part of those in charge of her, she subsequently did. The dispute between the parties turned on the question whether or not these errors were such as to absolve the defenders from responsibility for the sinking. There is nothing in the opinion of the Second Division, holding the defenders liable as for the total loss of the ship, or the speeches in the House of Lords, dismissing the appeal, to show that the foresight of the defenders at the time of the collision was in any way a relevant consideration. In the circumstances indeed it would have been surprising if they had foreseen the outcome. If the reasoning in *The Wagon Mound* is accepted, it can only be said that the grounds of decision in *Baron Vernon* v. *Metagama*, and comparable cases, were completely misconceived.

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[27] *H.M.S. London* [1914] P. 72.

[28] At p. 425.

[29] "*Re Polemis*" (1951) 14 M.L.R. 393, 408.

No doubt it is true to say that liability for negligence cannot be isolated from damage, meaning from injury or harm, for liability is not incurred so long as other people are not harmed, criminal liability apart. But "damage" in the sense of harm has to be distinguished from "damage" in the sense of loss. Damage (meaning harm) is what a man who is knocked down in the street sustains, *e.g.*, a blow causing him to fall and hit his head on the roadway. Damage (meaning loss) is what he suffers as a result of the blow, *e.g.*, pain, loss of wages, etc. Though liability cannot be dissociated from the former, it can be from the latter, as is obvious from the occurrence of disputes which are concerned solely with the issue of damages, liability being admitted. So, too, the phrase "remoteness of damage" conceals the fact that two problems are involved, and not one; for it may mean (a) remoteness of the harm sustained from the act or omission complained of, or (b) remoteness of the loss suffered from the harm. Is the denial by the Privy Council of Lord Sumner's distinction between the relevance of foresight to culpability and its relevance to compensation not due perhaps to failure to appreciate the different senses in which the word "damage" may be used? Lord Sumner plainly did not mean to say that culpability can be dissociated from harm, but that the question of liability for harm inflicted must be considered separately from the question of the loss suffered by reason of the harm.

The real difficulty which has arisen from *Polemis* is rather in regard to remoteness in sense (a) above than in sense (b). As the facts disclose, it was not a matter of deciding whether, liability for a negligent act (*viz.*, letting fall a plank into the hold of a vessel) being admitted or proved, the loss suffered (*viz.*, destruction of the ship) was too remote a consequence of the injury sustained (*viz.*, the fire), but whether the injury was too remote a consequence of the negligent act. That is all the clearer because there was no ascertainable injury inflicted except by the fire. In *The Wagon Mound*, on the other hand, actual, and not only potential, minor injury (*viz.*, fouling of the slipways) resulted from the act complained of (*viz.*, spillage of the oil) in addition to the major injury (*viz.*, the fire) from which the loss flowed. There does not seem, however, to be any importance in this distinction between the facts of *Polemis* and *The Wagon Mound*. As far as remoteness is concerned the cases are identical, since the question in both was, ought a person who has done something which caused, or could have caused, foreseeable injury of one kind to be made liable for consequences of another kind, which he could not be expected to foresee?

The question of remoteness of harm, as opposed to remoteness of loss, may arise in a similar, though rather different, form. Thus the problem may concern consequences, not of another kind, but more extensive than could be foreseen. *Smith* v. *London and South Western Ry.*, *supra*, is a case of this type, which may involve the "unforeseeable plaintiff." Again, the harm done, though similar in kind to that which could have been foreseen, may have been inflicted in an unexpected manner, as in *Thurogood* v. *Van den Berghs*,[30] where the *Polemis* rule was expressly applied by the Court of Appeal. It is hardly profitable, however, to distinguish between different varieties of remoteness, since there is no sharp line of division. Moreover, it may not be easy to say whether a true issue of remoteness is concerned or not. Thus *Harvey* v. *Singer Manuf. Co.*,[31] a similar case to *Thurogood's*, was decided on the ground that the defenders ought to have foreseen the class of accident which occurred.

It may be contended that the foreseeability test, even if it is not applicable as a means of determining remoteness of loss from injury, is yet appropriate to cases of remoteness of injury. In order to meet this argument it is necessary to notice some other ambiguous expressions which are the source of confusion of ideas. "Negligence" in the ordinary sense of the word is quite a different thing from "negligence" in the technical legal sense, connoting "carelessness only where there is a duty to take care, and where failure in that duty has caused damage."[32] Indeed, as the quotation shows, there are three possible senses of the word, for it may mean (a) carelessness, (b) neglect of a legal duty, or (c) neglect of a legal duty followed by damage. Even the most careful lawyers, however, constantly use the word in differing senses, sometimes almost in the same breath.[33] There is a corresponding ambiguity in the word "culpability," which in a case founded on negligence may be used, leaving aside moral culpability, to signify breach of a duty to take care and alternatively may be used to signify breach of duty plus injury. Only in the latter sense is it equivalent to "liability," a sense in which it is commonly used, as when Lord Sumner distinguished it from compensation.[34] There is always a danger in ambiguous expressions, and it would certainly seem that confusion has occurred from this one, for it may lead to the conclusion that foresight, which is undoubtedly necessary in regard to breach of duty to take care, is also necessary in regard to infliction of injury.

It is erroneous to assume that, since *liability* cannot be divorced from injury, *culpability* cannot either. If "culpability" is used in the sense, not of breach of duty plus injury, but of breach of duty alone, then there is no reason why a person should not be said to be culpable, without regard to the actual consequence that followed his act. If he failed in his duty to take care at the time he acted, he is still culpable even though no harmful consequences actually ensued at all. But he escapes liability. While it is unavoidable that the word " negligence " should be used in different senses, it may not be too late to hope that " culpability " will be used only in the more natural sense of breach of duty.

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[30] [1951] 2 K.B. 537.

[31] 1960 S.C. 155; 1960 S.L.T. 178.

[32] *Donoghue* v. *Stevenson*, *per* Lord Macmillan, 1932 S.C.(H.L.) 31 at 70; 1932 S.L.T. 317, at 338.

[33] See Lord Cooper's opinion in *Steel* v. *Glasgow Iron & Steel Co.*, 1944 S.C. 237; 1945 S.L.T. 70.

[34] *Weld-Blundell* v. *Stephens*, *supra*, *loc. cit.*

The proposition that a person may be culpable (*i.e.*, in breach of duty) although he does not, and could not be expected to, foresee the actual consequences of his breach of duty, does not mean that he is therefore liable for any sort of harm resulting from his action, provided it is not too remote, once culpability has been established. Culpability implies not only breach of a duty in the abstract but breach in respect of persons to whom the duty is owed,[35] which is a different thing from saying that one is bound to foresee the manner in which a person towards whom one is under a duty may be injured, or the particular persons injured, if one fails to carry out that duty.

In other words, A becomes liable to B, not because A has negligently created a dangerous situation which has resulted in injury to B, but because A's negligence has resulted in injury to B. It is not the consequences of A's *act* but the consequences of A's *breach of duty* that matter. Suppose that in *Polemis* there had been a stowaway in the hold of the ship, of whose presence the stevedores were reasonably ignorant, and that the falling plank, instead of causing a fire, had injured the stowaway. The charterers of the ship would hardly have been liable to the stowaway, for they would have been under no duty towards him. The dropping of a plank, which towards the shipowners was a *negligent* act, would with regard to the stowaway have been a *careless* act merely. Failure to appreciate the distinction between consequences of an act and consequences of negligence, or a negligent act, leads to misunderstanding of the *Polemis* rule.[36] The *Polemis* rule does not entail the fallacious notion of negligence or culpability " in the air."

The difference therefore between the effects of the *Polemis* rule and of the *Wagon Mound* rule is narrower, though not less important, than is often thought to be the case. It is common ground that a defender becomes liable only if he has caused injury to the pursuer by a negligent act in circumstances in which a reasonable person would have anticipated the risk of injury arising out of the negligent act to one towards whom he is under a duty to take care. It is common ground also that the foresight as to risks required of the defender need not be exact foresight, since this is never possible.[37] The question in dispute is one from a practical point of view really of degree, that is to say, of the precise standard of foresight required. If in *Smith* v. *London and South Western Ry.*[38] the plaintiff's cottage had been two miles, instead of two hundred yards, distant from the place where the fire started, the defendants would probably not have been held liable for burning it. It would not have been "within the area of potential danger which" the defendants "should reasonably have had in view."[39]

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[35] *Bourhill* v. *Young's Exr.*, 1942 S.C.(H.L.) 78; 1943 S.L.T. 105, *per* Lord Macmillan at 88, 108.

[36] Thus the statement of the rule in Winfield, *Tort*, 6th ed., 77, is inaccurate.

[37] Goodhart, " Liability and Compensation," *supra*, at 582.

[38] *Supra*.

According to the *Wagon Mound* rule, as formulated by Dr. Goodhart,[40] the standard of foresight required before liability can be established is foresight that an injurious consequence, of the kind that did eventuate, might result. But what does he mean precisely by the words "of the kind that"? If someone is injured by being knocked down by a vehicle and subsequently dies in hospital from pneumonia consequent on his injuries, is that a kind of consequence that ought to have been foreseen by the driver who knocked him down? It would be strange to hold that the driver was not liable in that event, whereas, if the cause of death had been fracture of the skull, the driver would have been liable. But if the driver is held to be liable whether death occurred in one way or the other, why should a person who has caused the destruction of a ship by fire escape liability because this was a different kind of result from that which he could have anticipated as the consequence of dropping a heavy plank on to the structure or cargo of a ship?

One possible argument in favour of imposing liability on the negligent driver, but not on the negligent dropper of the plank, is that it is unfair to hold a person responsible for a loss amounting to £200,000 because of an act of negligence which might have been expected to result in a few dents and scratches. This, which may be called "the housemaids' baby" argument, is not persuasive, and Dr. Goodhart refrains from relying on it.[41] The loss must fall on someone, and why on the innocent shipowners rather than the guilty charterers, even though their act of negligence was a little one?

If Dr. Goodhart had said that liability depended on foresight, not of injurious consequences of the kind that eventuated, but on injurious consequences of the *class* that eventuated, the statement might be unobjectionable, provided that the word "class" was given a very broad interpretation. Supposing that Carlyle had died of heart failure on hearing that his manuscript of *The French Revolution* had been accidentally burned, his widow would have been unlikely to succeed in an action of damages on account of his death against John Stuart Mill. Death might have resulted from the accident, but it would hardly have resulted from Mill's negligence in allowing the manuscript to be destroyed. In regard to that consequence, Mill would not have committed a breach of duty to take care.

The usefulness of the foreseeability test depends on whether a clear and consistent meaning can be attached to that expression. It is not possible otherwise to distinguish between those risks that ought reasonably to be foreseen and those that need not be, for the purpose of determining liability and non-liability. Obviously a person cannot be held accountable for all the consequences of his acts, and it may be conceded that the *Polemis* rule, namely, that the consequences must be "direct," does not provide a satisfactory test for enabling a line to be drawn. The question is, does the notion of foreseeability provide a better means of solving the problem, or does it merely add to confusion of thought? It is essential then to examine the notion of foreseeability closely.

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[39] *Bourhill* v. *Young's Exr.*, *supra*, *per* Lord Thankerton at 83, 106.

[40] "Liability and Compensation," *supra*, at 588.

[41] But not the Privy Council: see *The Wagon Mound*, *supra*, at 422.

There are two stages in the determination of liability: first culpability must be established, and secondly resulting injury must be established. Just as heads of damage, or items of loss, must be ascertained before the amount of damages due can be fixed in terms of money, so the matter of culpability, it is surely evident, must be settled before the question for what consequences of his wrongdoing the culprit should be held liable arises. Until the former has been determined, no attempt to answer the latter is possible, since his liability is in respect of that wrongdoing and not of anything else. Yet to say that liability is dependent upon the wrongdoer's foresight of consequences seems to involve the assertion that breach of duty, which is the same thing as culpability, cannot be ascertained until the issue of liability comes to be decided. This difficulty can only be resolved if the foreseeability test is used twice, once to determine culpability, or breach of duty to take care, and again to determine liability for the consequences of the breach.

Thus, in *Polemis* the court had to consider two separate questions concerning the foresight of the workmen: (1) whether the workmen were bound to foresee that damage of some kind might be caused to the ship, or the cargo, or a workman in the hold, if they carelessly allowed a plank to fall into the hold; (2) whether the workmen were bound to foresee that, should they carelessly allow a plank to fall, the consequence might reasonably be the destruction of the ship through a fire caused by the falling plank. It is obvious that these are separate questions, since the arbitrators answered the first in the affirmative and the second in the negative. It is also obvious that the second could arise only on the hypothesis that the first was answered in the affirmative.

This double requirement of foresight imposes a stringent obligation which might well make anyone who was not mentally acrobatic hesitate before he did anything that could conceivably result in harm to others. There is some logical absurdity, as Hart and Honoré observe,[42] in asking whether the risk of further harm, arising from a harmful situation which a reasonable man would never have created, would itself have deterred a reasonable man from acting. Is a driver to think, not only of the children whom he sees crossing the street, but of the adult who might dash out from the pavement to rescue them if he does not slow up soon enough, or to contemplate the possibility that he might knock down the rescuer, that the latter might be taken to hospital, and that a surgeon might there operate on him negligently and cause him additional injury? Whether or not it is a logical absurdity to demand forethought to this extent, the fact is notorious that hypothetical questions are always hard to answer, and that persons who are not fairly well educated find it hard even to understand them.

The difficulty involved in the test of foreseeability is not merely the complicated processes of thought which it requires, or its artificiality, as Dr. Glanville Williams points out, when it is extended to ulterior consequences. In applying the test for a second time to determine what harmful consequences a wrongdoer, already adjudged to be such, ought to foresee, a radically different use of the term " foresight " is made to that made in determining culpability.

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[42] *Causation in the Law*, 239.

It is well established that, in considering culpability, it is the normal person only who must be borne in mind by one who is under a duty to take care. " . . . in the absence of special knowledge or of circumstances under which special knowledge would be reasonably inferred, the reasonable man is entitled to proceed on the basis of what usually happens to normal people."[43] Let us call foresight in this sense foresight *a*. If, on the other hand, the test of foreseeability is to be applied to remoteness of injury, the range of foresight required is very much greater. Let this be called foresight *b*. Dr. Goodhart's answer, for instance, to the question posed by " the eggshell skull " problem is that, " although it is unusual to find a man with such a skull, it is not so extraordinary as to make the consequences unforeseeable."[44]

Moreover, there can be no doubt that, for purposes of foresight *a*, more is needed than a bare or remote possibility of the occurrence of injury. " It is not enough that the event should be reasonably foreseen. . . . There must be sufficient probability to lead a reasonable man to anticipate it."[45] Lord Oaksey in the same case pointed out that life would be impossible if the ordinarily careful man were to attempt to take precautions against every risk which he could foresee. " The ordinarily prudent owner of a dog does not keep his dog always on a lead in a country highway for fear it may cause injury to a passing motor-cyclist."[46] There are probably no statistics showing the number of persons with " eggshell skulls " in this country per million of the population. Perhaps such persons only exist in law books. Dr. Goodhart may have his reasons, which he does not tell us, for thinking that it is not a very extraordinary physical state. A number of other people perhaps would say it was. It is pretty safe, in any event, to assert that the chances of encountering a roaming dog on most country roads are as high, if not higher, than the chances of coming across a possessor of an " eggshell skull " there.

The risk that a person may be " a bleeder " is generally so slight that, if he mixes with a crowd and someone brushes against him, he cannot complain if he suffers severely.[47] So, too, the possessor of an " eggshell skull." But if the driver of a car carelessly runs into one of them, and his injuries are more serious than those of a normal person would be, the result is otherwise. The reason is that in the one event there is no breach of duty, while in the other the victim is a member of a class to whom the driver of the car owes a duty, *viz.*, persons who may be injured if he drives carelessly. It is clear that the duty is owed to a class and not only to specific persons, for it is often impossible for the driver of a vehicle to ascertain before an accident the particular individuals who may be involved in it, and therefore may come within the class to whom he owes a duty.[48] The driver cannot argue that a particular person in the class is peculiarly susceptible and that he could not have foreseen the fact.

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[43] *Blaikie* v. *British Transport Commission*, 1961 S.L.T. 189, *per* the Lord Justice-Clerk at 191; *cf. Bourhill* v. *Young's Exr., supra, per* Lord Wright at 92, 110; *per* Lord Porter at 98, 113; *Malcolm* v. *Dickson*, 1951 S.C. 542; 1951 S.L.T. 357, *per* the Lord Justice-Clerk at 547, 359.

[44] "Liability and Compensation," *supra*, at p. 577. Goodhart shows some vacillation in answering this question, which is crucial to his theory: *ibid.* at 581; " The Imaginary Necktie and *Re Polemis* " (1952) 68 L.Q.R. 514 at 534.

[45] *Bolton* v. *Stone* [1951] A.C. 850, *per* Lord Porter at 858.

[46] At 862; *cf. Milligan* v. *Henderson*, 1915 S.C. 1030; 1915, 2 S.L.T. 156.

[47] *Bourhill* v. *Young's Exr., supra, per* Lord Wright at 92, 110.

The problem of "the unforeseeable plaintiff," raised by *Smith* v. *London and South Western Ry.*, *supra*, and, to take another instance, *Carmarthenshire County Council* v. *Lewis*, *supra*, is perhaps to be solved on the same principle. The particular plaintiffs in these cases might be unforeseeable, but they fall in each case into the class to whom a duty was owed, in *Smith* the class of persons owning property "within the area of potential danger" of fire spreading from the railway, in *Lewis* the class of persons using the road at the time when, and within the area over which, a child straying from the nursery school might be expected to wander on the road. As Lord Reid pointed out in the latter case, it was reasonable to anticipate in the circumstances that a child might get on to the road, and "once the child was on the street anything might happen."[49] In other words, the unforeseeable might happen, a contingency which it is rather a waste of time trying to anticipate. Dr. Goodhart says of "the unforeseeable plaintiff" rule, based on *Smith* v. *London & South Western Ry.*, which as he observes is of special importance since the *Polemis* rule finds its source in it, that "from that day [1870] to this there does not seem to be a single English case in which this rule has been applied."[50] He must have forgotten *Carmarthenshire County Council* v. *Lewis*. It may be left to English lawyers to explain how the *Wagon Mound* rule can be a correct statement of their law in view of the decision of the House of Lords in *Lewis*.

These are difficulties in the notion of probability. The chance of a cricket ball striking the plaintiff in *Bolton* v. *Stone*, *supra*, was held to be too small to be considered as a substantial risk. But it is plain that the risk of a particular accident occurring may be substantial although it is more likely, even much more likely, that it will not occur than that it will occur. The matter cannot be reduced to rule, for what is or is not a legitimate risk for a man to take depends on all the circumstances, which vary infinitely from case to case. The obligation to weigh probabilities and to guard against possible changes depends, for example, on the gravity of the particular risk as well as the chance that the danger may materialise. One has to take more care when carrying a loaded gun than with an umbrella, and Lord Oaksey's dog-owner might or might not be justified in letting his dog run free in a crowded street. There may be situations where it is right and proper to take a great risk, as when a surgeon decides that it is necessary to carry out a dangerous operation in order to save a patient's life. Persons cannot always be expected to enter into a rational and careful calculation of possibilities. They simply may not have adequate opportunity to do so. They are not then necessarily culpable if they make mistakes. The reasonable man is not omniscient any more than he is incapable of error. His powers of foresight are limited by his knowledge, and a risk which cannot be foreseen before he acts, or at the time of acting, by the actor may be plain to others with fuller information available to them.

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[48] *Cf. Miller* v. *South of Scotland Electricity Board*, 1958 S.C.(H.L.) 20; 1958 S.L.T. 229, *per* Lord Keith at 34, 236.

[49] At 564.

[50] "Liability and Compensation," *supra*, at 572.

On these grounds Hart and Honoré designate as "practical foresight" what has here been called foresight *a*, and as "theoretical foresight" what has been called foresight *b*. They conclude, it is thought rightly, that the ambiguous use of the word "foresight" is fatal to the validity of the theory supported by Dr. Goodhart.[51] The essential difference is that "practical foresight" is foresight of risks, and "theoretical foresight" foresight of bare possibilities which may arise if a risk is run. If the so-called "foresight of consequences" amounts really to foresight of risks, the problem of what consequences ought to entail liability, once the risk has materialised, still remains to be solved. Dr. Goodhart's doctrine has now been accepted by the Privy Council in *The Wagon Mound*. His arguments, however, have not been reinforced. It should be added that a majority of writers, especially in the United States, reject the foreseeability doctrine, and the prevailing opinion on the Continent, in particular in Germany, is in favour of a doctrine at variance with it.[52]

The foreseeability test, even if it could provide an effective method of limiting responsibility for the consequences of negligence, would not solve the troublesome problems of causation, for, even if the responsibility of the wrongdoer were confined to consequences he could foresee, it would still be necessary to say what *were* the consequences of his negligence. This may involve far more than the mere factual application of "a comparatively simple rule," as Dr. Glanville Williams describes it. The courts often have to decide whether "the real cause" of an accident was an employer's fault in committing a breach of a common law or statutory obligation, or whether it was an injured workman's own fault. A question of that nature may give rise to the greatest difficulties, as it did in *Stapley* v. *Gypsum Mines*.[53] There is, indeed, no way of circumventing the problems of causation, among which that of remoteness of consequence is only one, though perhaps it cannot be disentangled altogether from the others.

The reason why the foreseeability theory has seemed plausible no doubt is that a close resemblance exists between the test applied in deciding the question of remoteness and that used to determine culpability, or breach of duty, and the one can easily be mistaken for the other. When a court is confronted with the problem whether a particular occurrence is a legally significant result of an act or situation, it appears usually to proceed to ask itself whether the occurrence was the "natural and direct" or "reasonable and probable" consequence of the act, or some expression to the same effect. The words may vary, but the theme is the same.[54] In those cases where the issue has been remoteness of loss, liability being admitted or proved, there seems no doubt that the courts in the past have not, whatever the effect of *The Wagon Mound* may be in future, regarded the foresight of the wrongdoer as a relevant circumstance. The test applied to determine whether or not the consequence is too remote is an objective, not a subjective, one; that is to say, what is taken into consideration is not what the wrongdoer ought to have anticipated, but what an imaginary reasonable man, viewing the circumstances at the time of the injury, *not* of the culpable act, and from a point of view that need not coincide with that of the culprit, would anticipate.[55] " . . . The damage is recoverable . . . if it is the natural and reasonable result of the negligent act, and it will assume this character if it can be shown to be such a consequence as in the ordinary course of things would flow from the situation which the offending ship had created." [56]

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[51] *Op. cit.*, at 238.

[52] *Cf.* Hart and Honoré, *op. cit.*, 248 and 411 *et seq.*

[53] [1953] A.C. 663.

What may reasonably be expected to flow from a particular state of affairs may frequently perhaps be the same as what the wrongdoer, as a reasonable man, would expect. But it may be quite different, since the foresight of the wrongdoer is, as has been shown, " practical foresight," foresight of risk, not of consequences, which he cannot be supposed always, or even generally, to contemplate, and may be quite unable to anticipate because he lacks the necessary knowledge of the circumstances. The objective test may be called artificial, but so is the conception of a reasonable man which the subjective test also employs, and while the latter is valueless the former is probably the best method that can be discovered to decide whether a given consequence is too remote or not. Such a process of reasoning is not, of course, one involving foresight at all to any real sense, and it would be more appropriate to say that it used " hindsight." [57] Hart and Honoré criticise the " hindsight " test on the ground that, from the point of view of one acquainted with all the circumstances existing at the time of a negligent act, few events that subsequently occur would appear unlikely.[58] Obviously, that is so. But the test must be applied with common sense. It is required only that the imaginary observer should know those facts that can reasonably be known.

If the correct test to apply when the issue is remoteness of loss is an objective test, and the wrongdoer accordingly may be liable for loss or damage which he could not foresee, it would be illogical, and hardly conceivable, that a different rule should apply where the issue is remoteness of injury, since the two sorts of remoteness are constantly referred to as if they were one, and it may sometimes be not at all easy to distinguish them.[59] The language used by the courts is ambiguous. When, for example, it is said that "the test of proximity is whether what has flowed from the act is what could have been anticipated by a reasonable man as a natural and probable consequence of it," the question whether the reasonable man is to be identified or not with the wrongdoer is left open.[60] All that can be said is that the terms used when the issue is remoteness of injury are identical with those used when remoteness of loss is in issue, and that, in the earlier cases at least, they are often used in a way that is as consistent with the objective as with the subjective sense, or more so.[61] It is true that in recent cases dicta of Lords Thankerton and Macmillan in *Muir* v. *Glasgow Corporation*[62] have often been quoted as if they supported a subjective test.[63] *Muir*, however, was not a case involving remoteness, the matter under discussion by Lords Thankerton and Macmillan being the nature and extent of the duty to take care. The point they were making, namely, that one is bound to take precautions against those dangers only that a reasonable man would foresee, was stated more accurately by Lord Romer in the same case.[64] There is a similar ambiguity in English cases. A subsequent reference, however, by Lord Wright to *Summers* v. *Salford Corporation*[65] indicates that he there used the expression "direct and natural consequences" in an objective sense.[66]

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[54] *Cf. H.M.S. London*, *supra*, *per* Evans P. at 77–78; *Macdonald* v. *McBrayne*, 1915 S.C. 716; 1915, 1 S.L.T. 333, *per* the Lord Justice-Clerk at 722, 338; *per* Lord Dundas at 723, 338; *per* Lord Salvesen at 724, 339; Walker, *Damages*, 537–538.

[55] Glegg, *Reparation*, 4th ed., 38; *cf. Cowan* v. *National Coal Board*, 1958 S.L.T. (Notes) 19, *per* Lord Cameron.

[56] *Baron Vernon* v. *Metagama*, 1928 S.C. (H.L.) 21; 1928 S.L.T. 117, *per* Lord Haldane at 25, 118. This dictum is quoted in the *Encyclopaedia of the Laws of Scotland*, Vol. X, para. 590, as showing that the damage must be foreseeable by the wrongdoer. But no question except that of causal connection between injury and heads of damage was there raised. The dictum shows therefore rather the contrary to what is asserted in the *Encyclopaedia*.

[57] *Cf.* Lord Wright, " *Re Polemis.*"

[58] *Op. cit.*, 245.

If the "hindsight," or objective, test is employed, the criterion adopted to determine whether a particular consequence is too remote or not, in whatever way the issue of remoteness arises, will be, whether the person's injury or loss, as the case may be, was the normal consequence of the negligent act or the injury, in the sense that it was the consequence which, given the facts existing at the time of the negligent act, or of the injury, might be expected in the ordinary course of events to follow, irrespective of the fact that the wrongdoer did not or could not foresee it. This is not substantially different from the test applied in *Polemis*, though the expression "direct consequence" was unhappy, since it suggests that there is some infallible way of distinguishing some consequences from others. The problem of determining what consequences should be considered as legally significant is one to which, from the nature of things, no wholly satisfactory solution can be found. It remains in the last resort a matter of impression, which does not however imply that no general rule can be of assistance in solving it. It implies only that the general rule is subject to more or less extensive qualification in certain circumstances, as where the rules of *volenti non fit injuria* and contributory negligence come into play, and in regard to certain types of case, *e.g.*, nervous shock cases.

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[59] Professor Walker treats *Polemis* as an instance of remoteness of loss, but this is surely erroneous: *Damages*, 534.

[60] *Malcolm* v. *Dickson*, 1951 S.C. 542; 1951 S.L.T. 357, at 547, 359.

[61] *Allan* v. *Barclay* (1864) 2 M. 873, *per* Lord Kinloch at 874; *Gray* v. *North British Ry.* (1890) 18 R. 76, *per* Lord President Inglis at 78; *per* Lord McLaren at 79; *Wilkinson* v. *Kinneil Cannel Co.*, 24 R. 1001, *per* Lord Kinnear at 1007, *per* Lord Adam at 1006; *Baikie* v. *Glasgow Corporation*, 1918 S.C. 67; 1917, 2 S.L.T. 194, *per* the Lord President at 70, 196; *per* Lord Skerrington at 72, 197; 1919 S.C.(H.L.) 13; 1919, 1 S.L.T. 126, *per* Lord Buckmaster at 14, 126; *Fraser* v. *Pate*, 1923 S.C. 748; 1923 S.L.T. 457, *per* Lord Anderson at 754, 460; *McWilliam's Tutor* v. *Hunter & Clark*, 1926 S.L.T. 676, *per* the Lord President and Lord Sands at 677. The observations of Lord Sands in the last-mentioned case especially seem to favour the objective test.

[62] 1943 S.C.(H.L.) 3; 1944 S.L.T. 60 at 8, 10, 61, 62.

[63] *Steel* v. *Glasgow Iron & Steel Co.*, 1944 S.C. 237; 1945 S.L.T. 70, *per* the Lord Justice-Clerk at 247, 74; *per* Lord Jamieson at 265, 82; *Malcolm* v. *Dickson*, *supra*, *per* Lord Mackay at 551, 360; *per* Lord Patrick at 556, 363; *Blaikie* v. *British Transport Commission*, 1961 S.L.T. 189, *per* Lord Patrick at 193; *per* Lord Strachan at 194.

[64] *Supra*, at 19, 66: "the appellants can only be fixed with liability if it can be shown that there materialised a risk that ought to have been within the appellants' reasonable contemplation."

[65] [1943] A.C. 283, at 296.

[66] *Cf.* "*Re Polemis*."

The preceding arguments may be summarised as follows:

1. In order to determine for what consequences of negligence a person should be held liable in damages, it is necessary to have in view that the problem is a complex one, the different elements in which need to be clearly distinguished: (a) in the first place there is the element of culpability, or breach of duty to take care; (b) secondly, there is the element of injury, or harm, resulting from the breach of duty; (c) thirdly, the items of loss, or heads of damage, in respect of which compensation is claimed; and (d), lastly, the assessment in terms of money of the damages payable.

2. Questions of remoteness may arise in various ways, depending on the true issue before the court. In particular, the question may be one of remoteness of the injury from the breach of duty, or negligent act, or it may be one of remoteness of the loss, or a particular item of loss, from the injury. The term "remoteness," as applied to consequences flowing from breach of duty or from injury, is to be understood in a broad sense, meaning that the consequences are unexpected, or abnormal, in such a way or to such an extent that the defender ought not to be made responsible in law for them. The debatable point is whether the proper test of remoteness should be foreseeability, in the subjective sense of the ability of the person charged with negligence to foresee the consequent injury and loss, or whether another (and necessarily objective) test is the proper one.

3. In both *Polemis* and *The Wagon Mound* the true issue was one of remoteness of injury. The cases were, however, distinguishable on the facts. In *Polemis* the injury could only be said to be remote from the culpable act by reason of its unexpectedness. On the other hand, the injury in *The Wagon Mound* was remote on any view. Accordingly, the condemnation of the *Polemis* rule by the Privy Council in deciding the appeal in *The Wagon Mound* was *obiter*.

4. In so far as the *Polemis* rule involves the use of the word "direct" to characterise consequences which are not too remote, the rule is defective. In so far, however, as it lays down that, culpability once established, liability may extend to consequences that could not be foreseen by the culprit, the rule is sound in theory and is

supported by well-established authority, including decisions of the House of Lords in English and Scottish cases, at least when the issue is remoteness of loss. A totally different rule could not without anomaly be adopted when the issue is one of remoteness of injury.

5. To suppose that the *Polemis* rule entails negligence "in the air," that is unrelated to ensuing consequences, is to misapprehend it. One cannot be held liable for negligence unless one has committed a breach of duty, and unless the breach of duty has resulted in injury and loss to a definite person or persons. One must therefore have caused injury to another, and in addition there must be a causal connection between the breach of duty and the injury, and between the injury and the loss suffered by the other party. This may be put in another way by saying that one becomes liable for negligence when one has committed a breach of a duty to take care to avoid *a class of* acts, the duty being owed to *a class of* persons, and an act of that class has been followed by injurious consequences to a person included within that class of persons. The class of acts referred to comprises all those acts which one can reasonably foresee may result in injury to persons to whom one owes a duty of care; the class of persons referred to comprises all persons whom one can reasonably foresee may sustain injury if one acts in breach of duty. But the actor is not to be excused because he cannot foresee the *particular* injurious consequences which follow his act, or the *particular* persons who sustain injury, a thing which is sometimes quite impossible. Moreover, the injury having been sustained, the person who has caused it is not to be absolved from liability to compensate the victim for his loss, because the former could not have foreseen the loss.

6. There are perhaps at least three separate logical errors in the rule which the Privy Council in *The Wagon Mound* preferred to the *Polemis* rule: (a) The mistaken idea that, because liability for negligence does not arise until harmful consequences ensue, therefore culpability cannot be determined until the consequences emerge, and the same test, namely foresight, which is applicable to the question of culpability must be applicable to that of liability. But culpability is distinct from liability, and must be established before it can be decided for what consequences of his breach of duty a culprit is liable. (b) It is erroneous to think that, unless liability is limited to such consequences as can be foreseen by a person charged with negligence, he must be held responsible for all the consequences of any careless act, except in so far as some arbitrary rule restricts his responsibility. For this implies that it is for the consequences of his *acts* that he incurs liability, whereas it is properly for the consequences of his *negligent acts*; and therefore he is not responsible with regard to consequences which are not causally connected with his breach of duty. (c) There can be no such thing in general as foresight of consequences, only foresight of risks. If a person chooses to run a risk with his eyes open, he cannot reasonably seek to avoid responsibility when unexpected consequences follow, as they often do. Being logically unsound, the *Wagon Mound* rule cannot be applied satisfactorily in practice. Attempts to apply it can only lead to such inconsistent use of the conception of foreseeability that it becomes useless for the purpose of determining whether a particular consequence should be considered as legally significant or not.

7. The most effective method of deciding whether a consequence is too remote is probably to postulate a reasonable man who views the situation at the time of the act complained of, or of the injury, as the case may be, in the light of all the circumstances which are ascertainable, and considers what consequences can be expected to follow in the ordinary course of events. It is this method, or something approaching it, which in fact the courts appear almost always to use. It can, however, only furnish a general rule, and various qualifications may be necessary.

8. The problem involved is one of fundamental principle, and wholly different solutions on different sides of the Border, or the Atlantic, are hardly admissible. While the views expressed by the courts have varied according to the exigencies of the cases before them, the majority of writers who have considered the matter have concluded at any rate that liability in negligence cannot be limited to foreseeable consequences, in the subjective sense. The prevailing opinion in Continental countries where the subject has been examined, especially in Germany, seems to be to the same effect.

SUMMARIES

By S. G. Kermack, c.b.e., m.a., ll.b., Advocate, Sheriff-Substitute of Renfrew and Argyll at Oban

American Law

Connecticut Bar Journal, March 1961: "Capital Punishment in Connecticut," by Professor Richard C. Donnelly and Carroll W. Brewster, Yale Law School.

American Bar Association Journal, June 1961: "Reconstructing Income in Tax Fraud Cases," by Robert M. Schmidt, Michigan Bar.

Oklahoma Law Review, May 1961: "Pleading Alternative Facts, Theories and Remedies," by Professor George B. Fraser, University of Oklahoma; "The Supreme Court and the Federal Employers' Liability Act," by William H. De Parcq, Minnesota Bar.

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Periodicals also received: *Canadian Bar Review*, *Documentation Juridique Étrangère*, *The Lawyer* (*incorporating The Oxford Lawyer*), *Jus* (*Milan*), *La Justícia*, *Revista de Derecho y Ciencias Políticas* (*Lima*), *Revista Jurídica de la Universidad de Puerto Rico*.

RECENT LITERATURE

Armour on Valuation for Rating. Third Edition. By J. P. H. Mackay, B.A., M.A., LL.B., Advocate, and J. J. Clyde, B.A., LL.B., Advocate. With a section on Industrial Derating by J. G. Milligan, B.A., LL.B., Advocate. 1961. Edinburgh: W. Green & Son, Ltd. £6 6s. net.

The previous edition of this work appeared in 1912, and in the meantime two editions of the invaluable *Guest on Valuation* have been published. Despite this, *Armour* never lost its status as a textbook of principle, being held in high respect by practitioners and judges alike. The development of the law, however, during the second half-century after the passing of the Lands Valuation (Scotland) Act, 1854, had destroyed its value to practitioners as a book for everyday use. The present edition has the worthy aim of retaining the value of the work as an exposition of principle while presenting practitioners with an up-to-date textbook. A large part of the original text has naturally required to be omitted or rewritten in view of the alterations in the law introduced by the Valuation and Rating (Scotland) Act, 1956, but the general style of the work has been retained and the citation of cases is extremely thorough. No judicial guidance is yet available upon the interpretation and application of the new rules for the ascertainment of gross and net annual value, and it is clear that many problems as yet unenvisaged will arise. The section of the book dealing with this aspect is therefore short, but the editors have put forward some views of their own and have indicated certain sources where assistance may be found, including English authority. The next sittings of the Lands Valuation Appeal Court may be expected to produce a number of decisions upon various aspects of the new rules. In order to keep the book up to date it is intended to publish periodical supplements. The book will be of much assistance to those concerned with the law and practice of valuation both during the current revaluation year and subsequently, and publishers and editors are to be congratulated upon an opportune and competent work.

H. S. KEITH.

Mayne and McGregor on Damages. Twelfth Edition. By Harvey McGregor, M.A., B.C.L., of the Inner Temple, Barrister-at-Law. (The Common Law Library, No. 9.) 1961. London: Sweet & Maxwell, Ltd. £7 10s. net.

The post-war period has seen great activity in the field of damages litigation; many interesting problems have been raised and many decisions enunciating important principles have been handed down by the courts. These factors by themselves would have necessitated a revised edition of *Mayne*, which since 1856 has been the chief authority in England on the subject. But *Mayne* was still, in its eleventh edition in 1946, a Victorian book, an old book encrusted by accretions of later cases, with its proportions, terminology and approach redolent of the nineteenth century, and Mr. McGregor has unquestionably taken the right course in boldly writing a completely new book, quarrying from *Mayne* rather than trying to preserve but revise the old text. A satisfactory revised edition could probably not have been done, and a new book founded on the old is far better. Very little indeed remains from the text of previous editions, and very rightly so. In the first place Mayne defined damages very widely, as the pecuniary satisfaction obtained by success in an action, which covers many kinds of recovery of money beyond the accepted modern view of damages as the pecuniary compensation for a breach of obligation; and he dealt at length with questions of liability for damages, as distinct from questions of the amount of damages and the factors relevant thereto. This edition adopts the modern view in both respects, though, strangely enough, the editor seems to have overlooked Lord Greene's remark in *Hall Brothers Steamship Co.* v. *Young* [1939] 1 K.B. 748, 756, as to what we understand by "damages" today.

Furthermore, the whole mass of material has been completely reorganised, dealing first with general principles, then with particular contracts and torts, and finally with procedure, and the book now exhibits, as Mayne's did not do, a visible and thoroughly systematic pattern. Moreover, this book is commendably readable, and it is possible to read long portions without difficulty and to follow an argument clearly set out. The editor assures us that he has reread all the authorities and it is evident from the fresh comments on some of the cases that they have not just been taken from *Mayne*.

Discussion of the important problem of remoteness of damage in tort has been greatly complicated by the purported overruling of *Re Polemis* by *The Wagon Mound*. This decision was reached, very unfortunately for the editor, while the book was being printed, but the editor and publishers gallantly and wisely took the book back and made the numerous and extensive changes necessary to take account of this decision, which is necessarily persuasive in England, and possibly also in Scotland. The decision in *The Wagon Mound* lays down a rule "which, in providing a single test for the existence and extent of liability in negligence, is at once neat and relatively simple" and Mr. McGregor proceeds on the footing that *The Wagon Mound* will prevail in England, though technically *Re Polemis* still stands. His discussion of this difficult case is lucid and valuable though he does not go into criticisms of the confused reasoning and muddled interpretations of earlier cases to be found in *The Wagon Mound*, taking the view (p. 93, note 9 (a)) that "It (*i.e.*, the *Wagon Mound* decision) cannot however be said to be any more or any less logical than the rule in *Re Polemis*. . . . For the matter is one of pure policy and is therefore open to criticism only at the policy level. The new rule indeed represents one facet of the modern trend, appearing in other areas of tort, away from strict liability and back to liability based upon fault."

Another crucial decision of recent years has, of course, been *British Transport Commission* v. *Gourley*, which is the basis of a new chapter on the incidence of taxation. This carefully considers the types of cases in which the rule in *Gourley* will apply, and secondly, how the quantum of damages is to be assessed in regard to tax. This chapter is very valuable; it emphasises that the rule in *Gourley* will apply only where (a) the loss being compensated by the damages would have been taxable, and (b) the damages given are not taxable. Fresh problems will doubtless continue to arise on the application of the rule in *Gourley* and this chapter will deserve careful consideration in any such case.

A conspicuous weakness of the previous edition of *Mayne* was the wholly inadequate attention paid to damages for personal injury and death. This edition makes that good by discussing fully (nearly 100 pages as against the half-dozen of the last edition, quite apart from further sections on defamation and similar injuries) the principles which can be gathered from the cases; but the editor has not sought to collect the numerous decisions, reported and unreported, which are merely examples of how much has been awarded in particular circumstances and which in the hands of Kemp and Kemp (*The Quantum of Damages*, 2 vols.) come dangerously near to being made into a tariff of damages for different sets of facts and kinds of injuries, or a set of factual precedents which pleaders may urge courts to follow, ignoring the need to consider every case on its merits, within the framework of the general guidance on quantum afforded by a few important cases. The noting and reporting of otherwise unreported awards of damages has gone quite far enough, if not too far, in England already, and this book is quite right not to trouble with such cases.

There are, of course, many differences in principle and in practice between damages in England and in Scotland and this book does not seek to deal with Scots law, nor to cite Scottish authority save where Scottish cases have been mentioned in English practice. Nevertheless on many points such as taxation and damages, mitigation, liquidate damages and penalty, remoteness in contract and so on, it can usefully be consulted in Scotland.

This edition is an unusually important and very satisfactory one; the drastic reorganisation and rewriting were absolutely necessary and justifiable, and they have been very successfully accomplished. The editor deserves great credit for his achievement.

David M. Walker.

La Promulgation, La Signature et La Publication des Textes Législatifs en Droit Comparé. Sous la direction de Jacques-Bernard Herzog et Georges Vlachos. (Travaux et Recherches de L'Institut de Droit Comparé de L'Université de Paris, XX.) 1961. Paris: Editions de L'Epargne.

This modest but useful work is a by-product of the recurrent French constitutional crises of recent years. In 1957 the French Government, with a view to revising the Constitution of 1946, asked the *Institut de Droit Comparé* of the University of Paris to make a comparative study of the techniques of bringing legislation into force. The establishment of the Fifth Republic in 1958, with an almost totally new Constitution, made the work redundant. Happily, however, the effort has not been wasted, for in the present volume reports from thirteen diverse countries, including three from Eastern Europe, have been gathered together and prefaced by a perceptive introduction from the pen of Marcel Waline, the well-known French authority on administrative law.

Despite the diversity of constitutional machinery in the countries contributing, the phenomenon of an increasing volume of legislation emitted by organs of state in an often perplexing variety of forms is strikingly universal. How far the principle of *ignorantia juris neminem excusat* can maintain itself in the face of this legislative explosion is a problem that is everywhere present, yet, so it seems, one of potential rather than actual urgency. For all the reporters expressed themselves as being satisfied with the system in operation in their countries and were content with the thought that, in practice, people generally get knowledge by one means or another of at least those laws which affect their own daily activities.

This can scarcely be called a satisfactory state of affairs, and it may well be asked whether the time has not come to permit the presumption of *ignorantia juris* to be rebutted by showing a failure on the part of the department of state concerned to draw new provisions to the attention at least of those standing to be prejudiced by them. The official journal or gazette which exists in many countries—but not, for this purpose, in Britain—is, as a means of informing the populace of their legal obligations, a mere fiction, though it does at least provide an accessible, if often incomprehensible, text of the law. Consultation with trade and professional groups before legislation is enacted is a welcome development in many western countries and helps to disseminate knowledge of the projected laws among the parties most affected. But as to publicising the bulk of legislation touching upon no specialised interest, it is left to newspapers and periodicals to print and radio stations to broadcast what they choose. Even at the parliamentary level of law-making this is not necessarily accurate or complete and is often distorted by the merging of news and comment. In the lower reaches of legislative activity such reporting is usually non-existent. Where penalties are exigible, a sufficient number of criminal convictions may impress the enactment on the public mind, but this can be of little consolation to those who are thus condemned to provide an example for the rest of the community. A very desirable British practice and one which could well be emulated in other spheres and other countries is the production of official booklets outlining the provisions of statutes such as the Rent Act and the National Insurance Act, which impinge on the lives of a great many people who are ill-equipped to understand them.

By way of explanation of the title of the work under review, it may be mentioned that French *doctrine*, with logical subtlety, draws a distinction between promulgation and publication of statutes and regulations of all grades. The former is a juridical act by which a competent authority (*e.g.*, *le Président de la République*) attests that the law has been enacted in conformity with every procedural requirement and brings it into operation. The latter is a factual process by which the law is transmitted and made known in the manner required by legislative procedure, formal and inadequate though that may be.

This distinction brings out one of the problems of comparative collections of this nature. The compiler sends out to his contributors questions or instructions framed in the categories of his own system. Some of the correspondents, whose systems share the same preconceptions as his, can reply directly and accurately. Others may be accustomed to these categories in a slightly different sense or may have to add to them others appropriate to their own systems; then great caution is called for on both sides if the answers are not to mislead. Others again may find the concepts and distinctions inquired upon to be quite foreign to their systems; then, if they are wise, they confine themselves to answering "Not applicable," as the contributor from the United Kingdom, Dr. L. Neville Brown, has had to do on a number of points. Onto these conceptual difficulties the verbal problems of translation may of course be superimposed.

To take what is ideally the next and most beneficial step in comparative studies and produce a synthesis and evaluation of so much disparate material demands a veritable legal polymath, a rare species indeed. But at the lower level of bringing together relevant material we have here an example of the valuable, if unspectacular, work which can be accomplished by careful organisation and editing. The compilers are particularly to be congratulated on assembling so much up-to-date information on a topic which the jurists of the common-law world have long neglected in favour of the "quirks and sinuosities" of judge-made law, but which has been rendered ripe for serious academic study by its modern expansion and importance. Perhaps even the De Gaullist régime, which has so extended the practice of law-making by ordinance, might find here both suggestions and warnings.

I. D. Willock.

OTHER PUBLICATIONS RECEIVED

(A later review is not precluded, especially where books are received shortly before going to press.)

Torts in the Conflict of Laws. A comparative study. By Stig Strömholm. 1961. Stockholm: P. A. Norstedt & Söners Förlag.

The Legal Conscience. Selected papers of Felix S. Cohen. Edited by Lucy Kramer Cohen. Foreword by Felix Frankfurter, Introduction by Eugene V. Rostow. 1960. New Haven: Yale University Press. 80s. net.

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Criminal Law. By Glanville Williams, LL.D., F.B.A. Reader in English Law in the University of Cambridge, and Fellow of Jesus College, Cambridge; of the Middle Temple, Barrister-at-Law. The General Part, Second Edition. 1961. London: Stevens & Sons, Ltd. £5 net.

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